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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-758

UNITED TRANSPORTATION UNION,
Petitioner,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Seventh Circuit

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IN THE

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No. .....

UNITED TRANSPORTATION UNION,
Petitioner,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Seventh Circuit

Petitioner prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on August 1, 1972, in *Chicago and North Western Railway Company, Plaintiff-Appellant v. United Transportation Union, Defendant-Appellee,* No. 72-1118.

OPINIONS IN THE CASE

The opinion of the court below, rendered August 1, 1972 in *Chicago and North Western Railway Co., Plaintiff-Appellant v. United Transportation Union, Defend-*

ant-Appellee, of which review is sought by this Petition has not been officially reported; it is unofficially reported 80 LRRM 3355 and appears as Appendix, (hereinafter, "App.") A, p. 1a. The opinions which have been rendered by the courts in this case are voluminous and are presented in the separate Appendix to this Petition in inverse chronological order.[1]

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered August 1, 1972 and appears as App. B, p. 7a. A petition for rehearing with suggestions for rehearing en banc was filed by petitioner in the court below on August 14, 1972 pursuant to and within the time allowed by Rule 40 of the Federal Rules of Appellate Procedure. That Petition was denied September 21, 1972; the order denying such petition for rehearing appears as App. C, p. 8a. The jurisdiction of this Court is invoked under 28 USC 1254(1).

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[1] The findings of fact, conclusions of law and decree of the District Court entered December 22, 1971 in *Chicago & North Western Railway Co., Plaintiff v. United Transportation Union, Defendant,* 336 F.Supp. 1149 from which CNW appealed to the court below appear as App. D, p. 9a. The findings of fact, conclusions of law and decree of the District Court entered August 13, 1971 in *Chicago and North Western Railway Co., Plaintiff v. United Transportation Union, Defendant,* 330 F.Supp. 646 appear as App. E, p. 48a. The majority and dissenting opinions delivered June 1, 1971 in this Court in this case, *Chicago and North Western Railway Co., Petitioner v. United Transportation Union, Respondent,* 402 U.S. 570 appear as App. F, p. 60a. The opinion of the Court of Appeals for the Seventh Circuit, delivered March 6, 1970 in *Chicago & North Western Railway Co., Plaintiff-Appellant v. United Transportation Union, Defendant-Appellee,* 422 F.2d 979 appears as App. G, p. 88a. The findings of fact, conclusions of law and decree entered December 11, 1969 by the District Court, *Chicago and North Western R. Co., Plaintiff v. United Transportation Union, Defendant,* are unreported and appear as App. H, p. 107a.

QUESTIONS PRESENTED

In this case (*Chicago and North Western R. Co., v. United Transportation Union*, 402 U.S. 570 (App. F, p. 60a), this Court held Section 2 First of the Railway Labor Act, hereinafter "RLA", requiring every reasonable effort to make agreements, to be judicially enforceable in judicial proceedings following exhaustion of the procedures of the RLA and made no comment upon an argument by the minority of this Court that the decision of the court would require that, in the event a violation of § 2 First should appear, the parties would be required to re-do one or more steps in the procedures of the RLA. Upon remand, the District Court first determined that neither party had complied with § 2 First and ordered further negotiations (App. E, pp. 48a, 55a-60a); after the further negotiations, the District Court found that both parties had complied with § 2 First (App. D, pp. 9a, 43a, 44a, 45a, 47a). The Court of Appeals reversed, holding that correction of the initially-found violation required repetition of all the procedures of the Act (App. A, pp. 1a, 3a, 5a). Accordingly, the questions presented are:

1. Whether the Court of Appeals misconceived, misconstrued and failed to apply the decision of this Court in this case by holding that it would be illegal for the Union to engage in self-help without re-submitting the dispute for re-mediation by the National Mediation Board, hereinafter "NMB" under the provisions of §§ 5 and 6 of the RLA. Included within this question are the subsidiary questions:

   (a) Whether the Court of Appeals erred in treating an argument in the Dissenting Opinion in this case in this Court as though it were the decision of the Court;

(b) Whether the Court of Appeals erred in deciding that re-mediation is a mandatory step for the Union to invoke, notwithstanding mediation is not a required step in the initial procedure if neither party invokes it and the Mediation Board does not proffer it.

2. Whether the Court of Appeals erred in holding that an anti-strike injunction should be continued in this case, notwithstanding § 4, § 7 and § 8 of the Norris-LaGuardia Act, hereinafter "N-LaG. Act", 29 USC § 104, § 107 and § 108. Included in this question are the subsidiary questions:

(a) Whether, after an initial finding by the District Court that neither party had complied with § 2 First of the RLA and a later finding that both parties had complied with it, the Court of Appeals could hold, consistently with § 4, § 7 and § 8 of the N-LaG. Act that the Railroad is entitled to an anti-strike injunction pending a subsequent judicial determination of compliance with § 2 First of the RLA in re-mediation;

(b) Whether the Court of Appeals could require the Union, before exercising self-help, to invoke re-mediation, notwithstanding the RLA imposes no such obligation on the Union but § 8 of the N-LaG. Act does impose such an obligation on the Railroad as a condition precedent to being granted an anti-strike injunction in any event.

3. In the event the Petition is granted, the Petitioner will also urge the further question: whether the decision of the District Court was proper under the evidence presented and was in accord with this Court's decision in this case last year.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Section 2, First, Section 5, First and Section 6 of the RLA which are respectively, 45 USC 152 First, 155 First and 156; Sections 4, 7 and 8 of the N-LaG. Act which are respectively 29 USC 104, 107 and 108; the pertinent portions of those statutes appear in App. I, pp. 114a to 117a.

STATEMENT OF THE CASE

This petition arises in the continuation of litigation following the decision of this Court in this case on June 1, 1971, *Chicago and North Western R. Co. v. United Transportation Union*, 402 US 570 (App. F, p. 60a), in which this Court reversed a prior decision of the court below and held that § 2, First of the RLA, requiring parties to make every reasonable effort to make agreements, imposes a legal obligation and that such obligation is judicially enforceable by injunction. This Court remanded the case for the lower courts to determine whether United Transportation Union and its predecessor unions had violated § 2, First in exhausting the procedures of the RLA in circumstances justifying an anti-strike injunction.

The labor dispute involved in this case has been and is known as the "crew consist" dispute. It arose from notices, hereinafter "Section 6 Notices", which were served pursuant to Section 6 of the RLA (45 USC 156), in June and July, 1965 upon some 80 railroads, including Chicago and North Western Railway Company and others which have been merged into it, hereinafter "CNW" or "Railroad" by representatives of the unions then representing employees of the railroads in the crafts of conductor, trainmen and yardmen; the Order of Railway Conductors & Brakemen, the Brotherhood of Railroad Train-

men and the Switchmen's Union of North America which, on January 1, 1969, merged into United Transportation Union, hereinafter collectively referred to as the "Union" or "UTU".

The § 6 notices served by the unions' representatives sought an agreement, to become effective upon the expiration on January 25, 1966 of the Award of Arbitration Board No. 282, which had been made pursuant to P.L. 88-108, approved August 28, 1967, 77 Stat. 132.[2] for a minimum of a conductor and two trainmen to be employed in crews in all classes of main and branch line road service and a minimum of a foreman and two helpers to be employed in crews in all classes of yard service.[3] The

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[2] Public Law 88-108 appears as an appendix to *Brotherhood of Railroad Trainmen, et al. v. Akron & Barberton Belt R. Co.*, 385 F.2d 581 at 605-607. That Act was the culmination of the initial phase of the crew consist dispute which is involved in this case. The crew consist dispute then involved about 200 railroads and the three unions then representing employees of the railroads in the crafts of conductor, trainmen and yardmen. It prohibited the exercise of self-help by the 200 railroads and the unions and required arbitration of the dispute by a board which became known as Arbitration Board No. 282 and for the Award of the Board to be effective for a period not exceeding 2 years. The Award became effective January 25, 1964 and expired January 24, 1966, *Brotherhood of Locomotive Firemen and Enginemen, et al. v. Chicago, Burlington & Quincy R. Co.*, 225 F.Supp. 11 (D.D.C. 1964), *aff'd* 331 F.2d 1020 (D.C. Cir. 1964), *cert. den.* 377 U.S. 918 (1964); *Brotherhood of Railroad Trainmen, et al. v. Akron & Barberton Belt R. Co., et al.*, 385 F.2d 581 at 588-591, which is further discussed, *infra*.

[3] The railroads, including CNW, refused to enter into conferences and negotiations with respect to the § 6 notices served by the unions in June and July 1965 and the unions invoked the services of the NMB under the provisions of § 5 of the RLA prior to the service by the railroads, including CNW, of their § 6 notices in December 1965.

Prior to the expiration of the Award of Arbitration Board No. 282 the unions called upon the railroads, upon which § 6 notices had been served in June and July 1965, including CNW, to ar-

labor dispute also embraced the issues arising from § 6 notices served on the representatives of the unions by CNW on December 24, 1965 and by the other railroads upon the Union at about the same time seeking an agreement for management to have the unrestricted right to determine the number and craft of persons to be employed in such crews. The § 6 notices served by CNW and other railroads upon the union also proposed initial concurrent handling of the notices served by the union in June and July, 1965 and the notices served in December, 1965 by the railroads and further that, if no agreement should be reached in initial conferences that the CNW and other railroads which concurrently served the same § 6 notice on the unions' representatives would refer the further handling of the dispute to a committee to represent all the railroads and proposed that the unions establish a

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range to put into effect, upon the expiration of the Award the crew consist rules which were in existence prior to the effective date of the Award. Thereupon, the railroads, including CNW, instituted an action against the unions in the United States District Court for the District of Columbia for a declaratory judgment that the changes in crew consist made pursuant to the Award would continue after the expiration of the Award until changed in pursuance of § 6 of the RLA and that the § 6 notices served by the unions in June and July 1965 during the period the Award was in effect were legally ineffective and for an anti-strike injunction until the procedures of the RLA should be exhausted. In that action, the District Court rendered successive opinions in *Akron & Barberton Belt R. Co., et al v. Brotherhood of Railroad Trainmen, et al.*, 250 F.Supp. 691 (D.D.C., 1966), 252 F.Supp. 207 (D.D.C., 1966), 254 F.Supp. 306 (D.D.C., 1966) and in a companion case *Akron & Barberton Belt R. Co., et al. v. Order of Railway Conductors & Brakemen*, 253 F.Supp. 538 (D.D.C., 1966), which were considered together by the Court of Appeals for the District of Columbia Circuit on appeals and cross appeals in *Brotherhood of Railroad Trainmen, et al. v. Akron & Barberton Belt R. Co., et al.*, 385 F.2d 581 (D.C.Cir. 1967), *cert. den.* 390 U.S. 923 (1968). The Court of Appeals affirmed the District Court's decision that, except in the case of certain agreements, the changes in crew consist rules made pursuant to the Award, continued in effect notwithstanding the expiration of the Award. The Court of Appeals reversed the decision of the District Court that the § 6 notices served

similar committee to handle further the unions' notices with the railroads' committee on a national basis.[4]

While the crew consist dispute was pending, subject to the jurisdiction of the NMB awaiting active mediation, CNW and the union sporadically engaged in negotiations, conferences, making and discussing proposals. In June and July 1969 the NMB actively undertook to mediate the dispute and, being unable to secure an agreement either to settle the dispute or to submit it to arbitration, terminated its jurisdiction of the dispute on October 19, 1969.

This action was commenced by CNW on November 19, 1969 in the United States District Court for the Northern

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by the unions in June and July 1965 were not legally effective when served and held that such notices were legally effective when served to require the railroads, including CNW, to enter into conferences and negotiations; that the railroads, by refusing to do so, had forsaken their right to insist on initial conferences for which § 6 of the RLA provides and the unions properly had advanced the disputes to mediation, the next step of the procedures of the RLA. Also, the Court of Appeals held the District Court erred in granting a preliminary anti-strike injunction because the railroads, including CNW, by refusing to enter into negotiations on the unions' § 6 notices, had breached their statutory duty under the RLA to confer and bargain on the unions' notices and, by such refusal, had forsaken their right to insist on conferences; had not complied with § 8 of the N-LaG. Act and that the District Court had erred in granting a preliminary anti-strike injunction. 385 F.2d 581 at 597-599, 613-614.

[4] The representatives of the union on each railroad entered into conferences with the railroads, including CNW, with respect to the § 6 notices served by the railroads upon the unions' representative in December 1965 but refused to agree to concurrent handling of the notices served by the respective parties or to establish a committee to handle all the notices served by the unions' representatives concurrently with a committee representing all the railroads. CNW then referred the handling of the dispute to a committee to represent it. The other railroads did likewise. That committee thereafter invoked the services of the NMB on behalf of CNW and the other railroads upon which the union had served notices and which had served notices on the union.

While the *Akron & Barberton Belt case* (f.n. 3, pp. 6-8 *supra*) was pending on appeal, the NMB terminated its services on Octo-

District of Illinois as an action arising under the RLA, 44 Stat. 577, as amended 45 USC §§ 151-160, an Act of Congress regulating interstate commerce in which the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs; the jurisdiction of the court was grounded upon 28 USC §§ 1331 and 1337.

In essence the complaint alleged the facts giving rise to the labor dispute involved as heretofore stated; that CNW had complied with § 2 First of the RLA through the mediation step of the procedures of the Act but that the Union had not by having refused to handle the dispute with CNW concurrently on a national basis with other railroads while maintaining an adamant fixed determination that it would not make an agreement more favorable to CNW than the agreements theretofore made by the Union with other railroads, regardless of what relevant considerations CNW might advance, by refusing to bargain on CNW's proposals to reduce the size of main line road crews; CNW sought a declaratory judgment and an anti-

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ber 4, 1966 with respect to the crew consist dispute arising from § 6 notices served in June and July 1965 by the union upon the Atlantic Coast Line R. Co., the Boston & Maine R. Co. and the Des Moines Union R. Co., and by those railroads upon the union in December 1965. On November 1, 1966, those railroads instituted *Atlantic Coast Line R. Co., et al. v. Brotherhood of Railroad Trainmen* in the United States District Court for the District of Columbia. The railroads sought a declaratory judgment that the unions had violated § 2 First of the RLA in bargaining with each of the railroads and by refusing to agree to concurrent handling of the crew consist disputes. The District Court (262 F.Supp. 177) found the union had bargained with each of the three railroads as required by § 2 First of the RLA except for having refused to agree to establish a committee concurrently to handle the disputes and issued an anti-strike injunction. The Court of Appeals reversed, holding the unions had not violated § 2 First of the RLA by refusing to agree to concurrent handling of the disputes on a national basis; the issue of whether the bargaining conduct of the union was in compliance with § 2 First was not appealed, *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co.*, 383 F. 2d 225 (D.C.Cir. 1967). This Court denied certiorari, 389 U.S. 1047 (1968).

strike injunction on the ground that the procedures of the RLA had not been exhausted by the union in compliance with § 2 First of the RLA.

The union, in its answer, which was filed December 2, 1969, asserted CNW's complaint failed to state a claim upon which relief could be granted under either § 2 First of the RLA or under the N-LaG. Act because it had been judicially determined in *Brotherhood of Railroad Trainmen, et al. v. Akron & Barberton Belt R. Co., et al.* (f.n. 3, pp. 6-8 *supra*) that CNW had violated the RLA by refusing to enter into conferences with the union on the union's § 6 notice and also that the union's refusal to handle the disputes on a national basis had been judicially determined not to be in violation of § 2 First of the Act in *Atlantic Coast Line R. Co., et al. v. Brotherhood of Railroad Trainmen* (f.n. 4, pp. 8-9 *supra*), and denied the union had violated § 2 First of the Act in its bargaining conduct with CNW through the mediation step of the procedures of the Act and sought dismissal of CNW's complaint.

After hearing evidence of the bargaining conduct of the parties prior to, during and subsequent to mediation, the District Court, on December 11, 1969, entered findings of fact, conclusions of law and a decree dismissing the CNW's complaint on the ground the question whether there had been compliance with § 2 First of the RLA was not justiciable but was a matter for administrative determination by the NMB which had determined the question; that the procedures of the RLA had been exhausted for more than thirty days with respect to the dispute between CNW and the union and that the court was without jurisdiction under the provisions of §§ 4 and 7 of the N-LaG. Act to continue an anti-strike injunction (App. H, pp. 112a, 114a).

CNW appealed to the court below from the decision of the District Court.

On March 6, 1970, the court below 422 F.2d 979 (App. G, pp. 88a, 106a), affirmed the District Court's decision that compliance with § 2 First of the RLA was to be enforced by the NMB and not by the courts, which decision the court below considered to be in conflict with a decision by the Court of Appeals for the Fourth Circuit in *Piedmont Aviation, Inc. v. Airline Pilots Ass'n. Int'l.*, 416 F.2d 633 (App. G, pp. 88a, 106a).

This Court granted certiorari October 12, 1970 (400 US 818) to consider the important question whether § 2 First of the RLA is to be enforced by the NMB or judicially on which question the lower courts had expressed divergent views, 402 US 570 at 572-3, 587 (App. F, pp. 60a, 62a, 76a).

This Court held § 2 First of the RLA imposes upon the parties a legal obligation which is judicially enforceable by injunction, 402 US at 578-581 (App. F, pp. 60a, 67a-70a). The Court further said, 402 U.S. at 574, 584 (App. F, pp. 60a, 63a, 73a):

> ". . . The parties have not requested us to decide whether the allegations of the complaint or the evidence presented at the hearing was sufficient to show a violation of § 2 First, and the lower courts, by their resolution of the threshold questions, did not reach the issue. Accordingly, we intimate no view on this matter.
>
> ". . . As we noted at the outset, we have not been requested to rule on whether the record shows a violation of § 2 First in circumstances justifying a strike injunction, and we do not do so. Such a question should be examined by this Court, if at all, only after the facts have been marshaled and the issues clarified through the decisions of lower courts.
>
> "In view of the uncertainty heretofore existing on what constituted a violation of § 2 First and what

showing was necessary to make out a case for a strike injunction, we believe the appropriate course is to remand the case to the Court of Appeals with instructions to return the case to the District Court for the taking of such further evidence as the parties may deem necessary and that court may find helpful in passing on the issues which the case presents in light of our opinion today. . . ."

In pursuance of the decision and mandate of this Court, the District Court vacated its prior decree and conducted further proceedings in the case commencing on July 29, 1971.

At that time each party stated it had no further evidence to offer and the District Court heard arguments by the parties with respect to whether, under the decision of this Court, the railroad had shown compliance by it with § 2 First of the RLA and § 8 of the N-LaG. Act and a violation by the Union of § 2 First of the RLA.

On August 13, 1971 the District Court made findings of fact and conclusions of law and entered a decree, 330 F. Supp. 646 (App. E, p. 48a). The District Court found that prior to that date neither party had bargained in good faith through the mediation step of the procedures of the RLA nor since the NMB had terminated its jurisdiction of the dispute. The District Court also held it had no authority to remand the controversy to the NMB because the courts, rather than the NMB, have the authority to determine whether either or both parties have bargained in accordance with § 2 First of the RLA, issued an anti-strike injunction to preserve the *status quo* and ordered further negotiations by the parties (App. E, pp. 48a, 55a, 57a, 59a).

On November 18 and 19, 1971 the District Court conducted further proceedings in the case. At the outset of the hearing the court incorporated into the record of that

proceeding all of the evidence theretofore taken in the case and took evidence of the further bargaining conduct of the parties pursuant to its August 13, 1971 order.

On December 22, 1971, the court entered findings of fact, conclusions of law and a decree, 336 F.Supp. 1149 (App. D, p. 9a). The court found the facts with respect to the entire bargaining conduct of the parties and that both parties had bargained in good faith in compliance with § 2 First of the RLA; held it was without authority to remand the controversy to the NMB; that the procedures and *status quo* requirements of the RLA had been exhausted and that the court was without jurisdiction under §§ 4 and 7 of the N-LaG. Act to continue an anti-strike injunction in effect, except pending appeal. 336 F.Supp. at 1166-1169 (App. D, pp. 9a, 43a-48a).

CNW appealed to the court below from the decision of the District Court on January 6, 1972 and that appeal was docketed in the court below as *Chicago and North Western R. Co., Plaintiff-Appellant v. United Transportation Union, Defendant-Appellee,* **No. 72-1118.**

On January 10, 1972, the District Court granted an anti-strike injunction pending the disposition of CNW's appeal and on January 13, 1972 the Union appealed from the District Court's order granting such injunction which was docketed in the court below as *Chicago and North Western R. Co., Plaintiff-Appellee v. United Transportation Union, Defendant-Appellant,* No. 72-1115. The court below denied a motion by UTU in No. 72-1115 to dissolve the injunction pending appeal but consolidated the two appeals for briefing and argument and ordered disposition thereof expedited.

The court below rendered its opinion and judgment with respect to both appeals on August 1, 1972 (App. A, p. 1a).

It affirmed the order of the District Court granting an anti-strike injunction pending CNW's appeal in *Chicago*

and North Western R. Co., Plaintiff-Appellee v. United Transportation Union, Defendant-Appellant, No. 72-1115 with respect to which decision a separate petition for writ of certiorari is being filed by UTU in this Court.

In *Chicago and North Western R. Co., Plaintiff-Appellant v. United Transportation Union, Defendant-Appellee,* No. 72-1118, the court below reversed the decision of the District Court and remanded the cause for submission of the dispute to re-mediation by the NMB. That decision and judgment of the court below is the subject of this petition.

The court below conceived the issues presented for decision by it to be ". . . what steps of the statutory procedure must be re-visted where [initially] there has not been a good faith compliance with Section 2 First." It stated there was another issue ". . . which our disposition obviates, *viz:* What guidelines must the District Court follow in determining whether there has been a good faith compliance with Section 2 First?" (App. A, pp. 1a, 3a).

The court below considered the August 13, 1971 findings of fact and conclusions of law by the District Court that both parties theretofore had gone through the procedures of the Act with a desire not to reach an agreement as having so tainted every step of the procedures of the Act that it would be necessary for them to re-visit each step in a good faith effort to settle their dispute. The court below held the District Court had required the parties to re-visit only the joint conference step in the procedures of the RLA and "approved" the December 22, 1971 findings by the District Court that the parties had complied with Section 2, First as being with respect only to such joint conference step and conditioned its "approval" of such findings upon the parties hereafter demonstrating their good faith in mediation, the next step in

the procedures of the RLA which the court below held the parties must exhaust and that, since this the parties had failed to do and had not been required by the District Court to do so, reversed the judgment of the District Court and remanded the cause to the District Court to require re-mediation of the dispute by the NMB in which the parties should demonstrate their good faith and to continue appropriate restraint against self-help by either party until such should be done (App. A, pp. 1a, 2a, 5a, 6a).

REASONS FOR GRANTING THE WRIT

1. The Questions Which This Court Deliberately Refrained From Answering in Its Decision in This Case Last Year Have Emerged in the Ensuing Litigation as Not Only Questions of First Impression But Probably More Important to the Functioning of the Railway Labor Act and the Norris-LaGuardia Act Than Those for the Resolution of Which This Court Granted Certiorari Last Year.

In its opinion and decision in this case last year this Court held § 2 First of the RLA to impose a legal obligation which is to be overseen and enforced by appropriate judicial means and defined that obligation as being the absence of "a desire not to reach an agreement" in exhausting the procedures of the RLA, 402 U.S. 570 at 578-579 (App. F, pp. 60a, 67a, 68a).

This Court also resolved the other question presented—"whether the Norris LaGuardia Act strips the Federal Courts of jurisdiction to enforce the obligation [imposed by Section 2 First of the RLA] by a strike injunction". The answer was that an injunction may issue when it is the only practical, effective means of enforcing § 2 First and hence that the N-LaG. Act did not in this case forbid the District Court considering whether there had been a

violation of § 2 First by the Union, 402 U.S. 570 at 574, 581-584 (App. F, pp. 60a, 63a, 70a-73a).

The correct application of the decision of this Court and resolution of the questions left unanswered by this Court will directly affect the role of the judiciary, the nature and the efficacy of mediation by the NMB and the rights of parties under the provisions of the RLA and the N-LaG. Act in the resolution, through collective bargaining, of major disputes, i.e., those arising with respect to changes in rates of pay, rules and working conditions and the exercise of self-help as part of the collective bargaining process. It thus will affect all of the railroads and airlines and other employers subject to those Acts and the thousands of their employees and millions of the public.

2. The Court of Appeals Misconceived, Misconstrued and Failed to Apply the Decision of This Court and to Resolve the Questions for the Resolution of Which This Court Remanded the Case, Although the District Court Had Done So.

Although the Court of Appeals ignored the fact that this Court had decided "what guidelines the District Court should follow in determining compliance with § 2, First", it nevertheless failed to decide that question. Instead it conceived its function to be to decide "what steps of the statutory procedure must be re-visited when [initially] there has not been a good faith compliance with Section 2 First" and decided that question by holding that where a violation of § 2 First by a party had been found, such party must be required to re-visit and re-do each step in the procedures of the RLA (App. A, pp. 1a, 3a, 5a). Implicit in the decision below is the further requirement that an anti-strike injunction should be granted and remain in effect until there should be a judicial determination, after

re-mediation, of compliance with § 2 First during re-mediation.

The Court of Appeals apparently fell into this error by treating an argument in the dissenting opinion in this case in this Court opposing the majority opinion, holding § 2, First of the RLA to establish a judicially enforceable legal obligation as though it were the decision of this Court.

This Court, in its opinion in this case last year, made no reference to whether parties should be required to re-visit and re-do any step in the procedures of the RLA which had been concluded in the event a violation of § 2 First of the Act by a party should be found in a judicial review of the conduct of the parties in exhausting such procedures. Rather, it was in the dissenting opinion, in an effort to denigrate the result of the court's holding § 2 First judicially enforceable that it was said, 402 U.S. at 596 (App. F, pp. 60a, 84a, 85a):

> ". . . In essence, the court holds that a District Court has the duty under § 2 First to assess the bargaining tactics of each of the parties *after* the entire statutory scheme has run its course. If, then, the Court determines that a party had not exerted sufficient effort to reach settlement, it should enjoin self-help measures, and, if such actions is to make any sense within the statutory scheme, remand the parties to some unspecified point in the bargaining process. Such a notion is entirely contrary to the carefully constructed premise of the Railway Labor Act."

And the dissent continued (402 U.S. at 597) (App. F, pp. 60a, 86a):

> ". . . The Act does not evidence an intention to return to any step once completed. . . . Moreover, the court provides absolutely no guidelines as to where in

the bargaining scheme the parties are to be remanded. Does the Court send them back to the Mediation Board which has already terminated jurisdiction finding the parties to have reached impasse? Should the court remand to some other phase of the proceedings? If so, where? . . ."

The decision of this Court did not require, nor even suggest, the re-doing of any step in the procedures of the RLA. The dissenting opinion argued there was no authority for requiring the parties to redo any step of those procedures. Thus, the decision of the court below finds no support in either the majority or the minority opinion of this Court in this case and plainly misconstrued and misapplied the decision of this Court in holding that the parties must re-do each step of the procedures of the RLA.

3. The Opinion of the Court Below in This Case Is in Conflict With the Opinion of the Court of Appeals for the District of Columbia Circuit in *Brotherhood of Railroad Trainmen, et al. v. Akron & Barberton Belt R. Co.*, 385 F.2d 581 *Cert. Den.* 390 U.S. 923 (1968) Which is *Res Judicata* as to the Parties to This Action.

The court below held that because the District Court initially found in August 1971 that neither of the parties had acted in good faith and, thus, had tainted each of the steps of the procedures of the RLA, that the parties must re-visit and re-do each step of the procedures of the RLA theretofore done, commencing with initial conferences for which § 6 of the RLA provides and then re-mediation; the court below also held the further negotiations required by the District Court after which the District Court found in December 1971 the parties had complied with § 2 First, satisfied only the initial conference step of the RLA (App. A, pp. 1a, 3a, 5a).

As appears from the opinion of the Court of Appeals in the *Akron & Barberton Belt case,* CNW, like other railroads "flatly refused" to engage in any bargaining with the union upon the § 6 notices which were served by the union in June and July 1965 so there never were any initial joint conferences. Clearly, then, the union could not have violated § 2, First of the RLA in conferences pursuant to § 6 of the RLA when the railroad refused to engage in such conferences.

The Court of Appeals for the District of Columbia Circuit held that CNW and the other railroads, by their refusal to negotiate with the union, had breached their statutory duty to confer and bargain and by such refusal ". . . have foresaken their right to insist on [initial] conferences", 385 F.2d at 597-598.

Yet the court below holds the union was required to re-engage in initial conferences and treats the conferences which the District Court required as being the initial conferences which the *Akron & Barberton Belt* case held the Railroad unlawfully had refused and therefore had foresaken their right to insist upon.

4. The Decision of the Court Below That Re-Mediation Is a Mandatory Step in the Procedures of the RLA Which the Union Must Invoke Is Without Support in the Decision of This Court in This Case and Is in Conflict With the Text of §§ 6 and 5 of the RLA Under Which Mediation Is Permissive.

The judicial proceeding established by the decision of this Court in this case for judicial enforcement of § 2 First of the RLA presupposes the exhaustion of the procedures of the RLA and the expiration of the *status quo* requirements of the Act incident thereto, and thus that the parties ostensibly have attained a position to exercise self-help. Prior to such time the *status quo* requirements of

the Act would make unnecessary any action to enforce compliance with § 2 First by injunction as a condition to the exercise of self-help; enforcement of the *status quo* requirements of the Act would be sufficient under the majority and minority opinions in this case and in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal*, 394 U.S. 369 (1969), and *Detroit & Toledo Shore Line R. Co. v. United Transportation Union*, 396 U.S. 142 (1969).

The text of § 6 of the RLA (App. I, p. 116a) prohibits the exercise of self-help ". . . unless a period of ten days has elapsed after termination of conferences [for which it provides] without request for or proffer of the services of the Mediation Board."

In *International Ass'n. of Machinists v. National Mediation Board*, 425 F.2d 527 (D.C.Cir., 1970), the union sought to compel the NMB to proffer arbitration which the union could refuse and acquire the right to strike after the expiration of the status quo requirements of the RLA subsequent to termination of mediation. In analyzing the status quo provisions of the RLA with respect to when the right to self-help arises the Court of Appeals for the District of Columbia Circuit said, 425 F.2d at 537: "Thus Section six, 45 USC § 156, authorizes a change in the status quo if mediation services have not been requested or proffered within ten days after the termination of the bargaining between the parties." That holding is in accord with the plain language of the statute.

The text of § 5 First of the Act (App. I, p. 115a), is in permissive language; it provides that the services of the NMB *may* be invoked by either party or *may* be proffered *sua sponte* by the Board.

The permissive nature of mediation, as distinguished from the "must" nature of conferences under § 6 and § 2 First of the Act was recognized by Mr. Justice Harlan

in writing the majority opinion in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969) at 378 it was said: ". . . a party desiring to effect a change in rates of pay, rules or working conditions must give advance written notice, § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both *may* invoke the services of the National Mediation Board, which *may* also proffer its services *sua sponte* if it finds a labor emergency to exist, § 5 First . . ." (*sua sponte* in text; other emphasis supplied). Later in *Detroit & Toledo Shore Line R. Co. v. United Transportation Union*, 396 U.S. 142 (1969) at 149 f.n. 14, Mr. Justice Black in writing the majority opinion reiterated the statement in the *Jacksonville Terminal* case which recognized the permissive nature of mediation.

The majority opinion of this Court in this case refers to the very page of the opinion in the *Jacksonville Terminal case*, on which Mr. Justice Harlan noted the permissive nature of mediation, 402 U.S. 574. The dissenting opinion in this case in this Court also noted the *may* nature of mediation, 402 U.S. at 597 (App. F, pp. 60a, 86a). The court below, in its opinion in this case, quoted the statement in the dissent in this case in this Court, saying: "the National Mediation Board *may* add its pressure through mediation" (App. A, pp. 1a, 5a). Nevertheless, the court below went on to hold that: ". . . the parties *must* also exhaust the next step [after initial conference], i.e., the National Mediation Board. This they have not done" (emphasis supplied). And the court below held "neither UTU nor CNW may under the Act resort to self-help . . ." because of their failure to invoke mediation (App. A, pp. 1a, 5a, 6a).

Even if the court below was correct in treating the conferences and negotiations of the parties pursuant to the August 13, 1972 order of the District Court as initial

conferences pursuant to § 6 of the RLA, more than ten days have expired since those conferences were concluded without the NMB *sua sponte* having proffered its services and without either CNW or UTU invoking the services of the NMB. In such circumstances, as heretofore shown, under the provisions of § 6 of the RLA, the parties may exercise self-help without mediation.

Further, if the court below was correct in holding that the parties must re-do each step of the procedures of the RLA, two further questions arise for which the court below offers no solution. Since the mediation step is permissive, insofar as the parties are concerned, and discretionary, insofar as the mediation board is concerned—(1) How could the parties compel re-mediation?, and in those cases in which the third step of the procedures of the RLA had been exhausted by the President having established an emergency board, pursuant to § 10 of the RLA, 45 USC 160, would the parties be required to re-do that step and if so, (2) How could the parties compel the re-establishment of an emergency board by the President to re-investigate and re-report to the President with respect to the underlying labor dispute?

5. The Decision of the Court Below That an Anti-Strike Injunction Should Be Continued in This Case Is in Conflict With the Text of Section 8 of the Norris-LaGuardia Act, 29 U.S.C. 108 as Construed by This Court in Its Opinion in *Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western R. Co.*, 321 U.S. 50 (1944).

We have seen above that the RLA does not impose a duty upon either party to invoke mediation at any time. However, § 8 of the N-LaG. (App. I, p. 117a) Act prohibits injunctive relief to any complainant who has failed to make every reasonable effort to settle a labor dispute "either by negotiation or *with the aid of any available*

governmental machinery of mediation or voluntary arbitration" (emphasis supplied).

In *Brotherhood of Railroad Trainmen v. Toledo, Peoria & Western R. Co.* (321 U.S. at 55-59, particularly in f.n. 11, p. 57 and 60-62) this Court made it clear that § 8 of the N-LaG. Act denies an anti-strike injunction to a railroad which fails to attempt to settle a labor dispute "with the aid of any available governmental machinery of mediation" although in that case injunctive relief was denied under § 8 of the N-LaG. Act because of the refusal of the railroad voluntarily to submit the labor dispute to arbitration, notwithstanding it clearly appeared that unlawful acts were being committed for which an anti-strike injunction otherwise would have been authorized under § 7 of the N-LaG. Act as an exception to the provisions of § 4 of the Act, as held in *Chicago, Rock Island & Pacific R. Co. v. Switchmen's Union of North America, infra.*

Plainly, the decision by the court below that an anti-strike injunction should be continued, notwithstanding the failure of CNW to seek mediation is contrary to and in violation of the provisions of § 8 of the N-LaG. Act as construed by this Court.

6. The Decision of the Court Below That an Anti-Strike Injunction Should Be Continued in This Case Is in Conflict With the Text of Section 7 of the Norris-LaGuardia Act, 29 U.S.C. 107 and the Decision of the Court of Appeals for the Second Circuit in *Chicago, Rock Island & Pacific R. Co. v. Switchmen's Union of North America*, 292 F.2d 61, *cert. den.* 370 U.S. 936 (1962).

Section 7 of the N-LaG. Act denies jurisdiction to courts to issue an anti-strike injunction except when "unlawful acts have been threatened and will be committed unless

restrained or have been committed and will be continued unless restrained" (App. I, p. 117a).

In *Chicago, Rock Island & Pacific R. Co., et al. v. Switchmen's Union of North America, et al.*, 292 F.2d 61, *cert. den.* 370 U.S. 936 (1962) the railroad sought an anti-strike injunction based upon an alleged violation of §§ 2 First and Second of the RLA. The union contended the court lacked jurisdiction under the N-LaG. Act to grant an injunction and appealed from an order of the District Court granting a preliminary injunction. The Court of Appeals reversed, holding that § 4 of the Act precludes the issuance of an anti-strike injunction in the absence of a showing that unlawful acts were threatened or being committed by the union as required by § 7 of the N-LaG. Act.

After the instant case was remanded by this Court to the District Court last year, the District Court first found in August 1971 that neither CNW nor the union had complied with § 2, First, issued an anti-strike injunction and ordered further negotiations. 330 F.Supp. 646 (App. E, pp. 48a, 55a-60a).

Following such further negotiations the District Court found in December 1971 that both parties had complied with § 2, First, 336 F.Supp. 1149 (App. D, pp. 9a, 43a-48a).

The court below took no exception to those findings by the District Court but, instead "approved" them although conditionally upon a subsequent judicial determination that the union complied with § 2, First in re-mediation.

Thus, the court below did not find the unlawful act required by § 7 of the N-LaG. Act for the issuance of an anti-strike injunction under the holding of *Chicago, Rock Island & Pacific R. Co., et al. v. Switchmen's Union of North America, et al.*, 292 F.2d at 71, but nevertheless held an anti-strike injunction should be continued.

CONCLUSION

For the foregoing reasons petitioner respectfully submits that the writ of certiorari sought should be issued. Petitioner further suggests that, since the judgment of the Court of Appeals was so patently in error and the judgment of the District Court, which has been published, was in accord with this Court's decision and mandate of last year, it would be appropriate to grant the writ, summarily reverse the judgment of the Court of Appeals and reinstate the judgment of the District Court. Such disposition would be in the interest of justice by bringing this litigation which, in one stage or another, has been pending since January 1966, to an expeditious conclusion.

Respectfully submitted

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-758

UNITED TRANSPORTATION UNION,
Petitioner,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Respondent.

APPENDIX

To Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX A

United States Court of Appeals
For the Seventh Circuit

Nos. 72-1115, 72-1118

Chicago & North Western Railway Company,
Plaintiff-Appellee-
Cross-Appellant,

vs.

United Transportation Union,
Defendant-Appellant-
Cross-Appellee.

OPINION

Decided August 1, 1972
(unreported)

Before Mr. Justice Clark*, Cummings and Pell, *Circuit Judges.*

Clark, *Associate Justice.*

The Chicago and North Western Railway Company (CNW) brought this suit in 1969 to enjoin a threatened strike call by the United Transportation Union (UTU) involving the work rules of employees of Northwestern on its railroad lines. North Western contended that UTU had not complied with its duty under Section 2 First of

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* Associate Justice Tom C. Clark, United States Supreme Court, Retired, is sitting by designation.

the Railway Labor Act (45 U.S.C. 8152 First)[1] to "exert every reasonable effort" to settle the work rules dispute between the parties as to the number of brakemen to be employed on CNW's trains. The court issued a temporary restraining order, but subsequently dismissed the suit on the ground that the UTU's duty under Section 2 First was not justiciably enforceable. This court affirmed, 422 F.2d 979 (1970). The Supreme Court, however, held that CNW's claims of violation were justiciable, 402 U.S. 570 (1971), and directed that the District Court consider and decide them on their merits. After a hearing the District Court joined (August 2, 1971) that the UTU had not—nor had CNW—bargained in compliance with Section 2 First during the various stages of the dispute and that, therefore, self-help in the form of a strike could not be indulged without exhausting "every reasonable effort" to settle the controversy, 330 F.Supp. 646 (1971), and it issued an injunction against a strike, *id.* at 652. The parties renewed their negotiations and additional hearings were held by the District Court in November, 1971. On December 22, 1971, a decree was entered holding that both parties had bargained in good faith and that the UTU was now free to resort to self-help. It further held that the court was without power to remand the dispute to the National Mediation Board (NMB) and it, therefore, dismissed the complaint for want of jurisdiction, 336 F.Supp. 1149. CNW filed its notice of appeal on January 6, 1972, and on its application the District Court entered an injunction pending appeal on

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[1] The sub-section provides:

"It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

January 10, 1972, enjoining a strike. The UTU noted its appeal from the latter order and moved to vacate the injunction or advance the appeal. The motion to vacate was denied, but the appeal was expedited.

1. *The Issues Involved:*

Two issues are involved in this appeal: (1) Did the District Court abuse its discretion in issuing the injunction pending the appeal? And, (2) what steps of the statutory procedure must be revisited when there has not been a good faith compliance with Section 2 First? There is a third question which our disposition obviates, *viz*: What guideline must the District Court follow in determining whether there has been a good faith compliance with Section 2 First?

We have concluded that the District Court did not abuse its discretion in issuing the injunction and that each of the steps provided by the Act must be reinvoked where the parties have not in good faith heretofore exerted every reasonable effort to settle their dispute. Only in this manner will the taint of previous bad faith be purged.

2. *The Issuance of the Injunctive Relief Pending Appeal:*

The UTU urges that the issuance of the injunction[2] staying the calling of the strike was violative of the

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[2] The District Court found that an injunction was necessary to maintain the *status quo* pending the determination of the appeal, because a strike would (1) moot the appeal; (2) irreparably injure CNW and the public, because it would suspend the transportation of freight and passengers resulting in the loss of hundreds of thousands of dollars in revenue each day to CNW; (3) deprive the public of transportation, including 90,000 commuters daily, as well as mail, freight, etc.; (4) seriously impair government services, including both military and civilian personnel, supplies, material, etc.; (5) threaten the health and welfare of a whole section of the country because of a shortage of food, medicines, etc.; and (6) stop essential transportation services to millions of people.

Norris-LaGuardia Act and an abuse of discretion. We believe that this contention is completely answered by the holding of this court in the previous appeal in this case [not disturbed by the reversal on other grounds]. See *Chicago & N.W. Ry. Co. v. United Transportation Union, supra,* at 983-985. We quote only one paragraph of the opinion:

> "There is nothing in the text of the Norris-LaGuardia Act or in the legislative history surrounding the drafting and enactment of the Act indicating a Congressional intent to remove from the District Court their long recognized power to grant injunctions pending appeal. To remove from the District Courts the power to grant injunctions pending appeal . . . is to in effect make the District Court the court of last resort on these matters regardless of the difficulty or the novelty of the issues involved. In the absence of any specific Congressional intention . . . we decline to read into the Act such a serious limitation into the judicial review process." At 984.

In addition, this is as the District Court found "a case of first impression" in which there are no precedential guidelines to follow and that present a "thorny problem" of explosive quality. In the light of these considerations, the "balance of equities herein favors the granting of an injunction pending appeal. . . ." While the employees here are protected by a million dollar bond, neither the public nor the railroad have any protection from the irreparable injury that would flow from a strike.

As for the claim that the UTU was not afforded a hearing on the injunction issue, the record indicates that CNW gave notice on December 22, 1971 of its intention to seek a stay pending appeal. Some two to three weeks thereafter UTU was given opportunity to and did present its position, but to no avail.

3. *Further Mediation:*

The principal issue involved here—further mediation—is not so easily resolved. However, we start with the proposition that in adopting the Act Congress intended to and did create a "scheme of gradually escalating pressures" as Mr. Justice Brennan aptly described them in *Chicago & N.W. Ry. Co. v. Transportation Union, supra,* at 597. And, he added: "The Act is built upon a step-by-step framework. Each one is carefully drawn to introduce slightly different pressures upon the parties to reach settlement from the preceding step. First, the parties confer jointly. Next, the National Mediation Board may add its pressure through mediation. . . ." *Id.* In short, "Congress was content to enact a machinery which dragged on, with cooling-off periods and various status quo restrictions, while the parties were required to 'treat with' one another." At 591.

However, as the Court points out in the opinion at 578: "The strictest compliance with the formal procedures of the Act is meaningless if one party goes through the motions with a 'desire not to reach an agreement' ". That is exactly what happened here when the parties previously went through each step of the procedures. The District Court has found on remand of the case that neither party acted in good faith in exerting every reasonable effort to settle their differences. Having so tainted every step of the required procedures of the Act, it is necessary that they revisit each step in a good faith effort to settle their dispute. The District Court, however, only required that the joint conference step be invoked. We submit that before self-help is permitted that the parties must also exhaust the next step, *i.e.*, the National Mediation Board. This they have not done. This latter step is the very heart of the Act, because it brings into play the mediation expertise of the Board. Still, this most influential and effective step has not in good faith ever been exerted.

In view of this failure to invoke this step, neither UTU nor CNW may under the Act resort to self-help and appropriate restraint must be continued to prevent such exercise. We do not pass upon the action of the District Court with reference to its findings of good faith efforts of the parties in their joint conferences in exerting every reasonable effort to settle their dispute. However the findings of the District Court as to the good faith of the parties in the joint conference stage are such that if they hereafter demonstrate their good faith in mediation, those findings will stand as approved. We do note that in Findings 78 and 79 the trial judge found that UTU would not agree to any proposal for reduction in the size of mainline crews; nor to accept any offer of additional compensation for employees working on crews of one conductor and one brakeman. Nor would CNW agree to the "Jacksonville formula" which most of the railroads have already embraced. In the light of the previous bad faith that the trial court found present at every step of the proceedings, such actions by the parties are suspect and in conjunction with slight evidence of future unwillingness to consider seriously any compromise may well be the basis for a bad faith finding. Such adamant positions—crystallized during the previous bad faith session of the parties—must be cast aside before good faith negotiation and conciliation will succeed. The trial court must appraise them with exceeding care and make certain that the parties are in "the strictest compliance" with the Act. If what the UTU indicated as to the financial condition of CNW is true, the union may be riding a good horse to death with featherbedding. On the other hand, if the additional brakemen are necessary to the safe and efficient operation of the railroad, they should be put on as they have been by other roads.

REVERSED AND REMANDED.

APPENDIX B

United States Court of Appeals
For the Seventh Circuit

Number 72-1118

Chicago & North Western Railway Company,
Plaintiff-Appellant,

vs.

United Transportation Union,
Defendant-Appellee.

CORRECTED JUDGMENT

Entered August 1, 1972

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and this cause be and the same is hereby Remanded to the said District Court in accordance with the opinion of this Court filed this day.

APPENDIX C

United States Court of Appeals
For the Seventh Circuit

Number 72-1118

Chicago & North Western Railway Company,
Plaintiff-Appellant,

vs.

United Transportation Union,
Defendant-Appellee.

ORDER

Entered September 21, 1972

On consideration of the petition of the appellee, United Transportation Union, for a rehearing by the Court in the above-entitled appeal, and, no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

It Is Ordered that the petition of the appellee for a rehearing in the above-entitled appeal be, and the same is hereby denied.

APPENDIX D

United States District Court
Northern District of Illinois
Eastern Division

Number 69 C 2401

Chicago & North Western Railway Company,
Plaintiff,

vs.

United Transportation Union,
Defendant.

December 22, 1971
(336 F.Supp. 1149)

Perry, District Judge

MEMORANDUM OPINION AND DECREE

This cause comes on for final judgment; and the Court, having heard the evidence and considered the briefs and arguments of counsel, hereby makes its findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff Chicago and North Western Railway Company is a corporation engaged in the transportation by rail of passengers and freight in interstate commerce and a "carrier" within the meaning of Section One (1) of the Railway Labor Act (45 U.S.C., § 151) and will hereinafter be referred to as "CNW". At the time of the

commencement of this action the CNW consisted of separate corporations which had been merged into the CNW as districts thereof; the CNW Railroad Company as it existed prior to such mergers had become known as the "CNW, Proper"; the former Chicago, St. Paul, Minneapolis and Omaha Railroad Company had become the "Omaha District" of the CNW; the former Milwaukee & St. Louis Railroad Company had become the "M & St. L." District of the CNW; the former Litchfield & Madison Railroad Company had become the "L & M" District of the CNW and the former Chicago Great Western Railroad Company became the Missouri District of the CNW in August 1969.

2. Prior to January 1, 1969 the Brotherhood of Railroad Trainmen was a voluntary union labor organization and the representative under the Railway Labor Act of train and yard service employees of some of the CNW and some of the other railroads which were merged into and became districts of the CNW; the Order of Railway Conductors & Brakemen was the representative under the Railway Labor Act of some train service employees of the CNW and other railroads which were merged into the CNW and the Switchmen's Union of North America was the representative under the Railway Labor Act of yard service employees of railroads which were merged into the CNW. Each of those labor organizations was represented on each such railroad by separate General Chairmen and separate collective agreements which existed between each such General Chairman and each such railroad with respect to rates of pay, rules and working conditions were retained after such railroads were merged and became districts of the CNW. On January 1, 1969 the Brotherhood of Railroad Trainmen, Order of Railway Conductors & Brakemen and the Switchmen's Union of North America were merged into and became a part of Defendant United Transportation Union which became a party

to each separate collective agreement theretofore existing between the separate railroads and the several labor organizations as the representatives of employees of the CNW and the other railroads which were merged into and have become districts of the CNW.

3. The Award of Arbitration Board 282 which was made in pursuance of Public Law 88-108, 45 U.S.C., § 157 (1971 Supp.), became effective June 24, 1964 for a period of two years. It prohibited changes in main line crews consisting of a conductor and two trainmen in road service but did authorize changes in main line crews consisting of a conductor and either more than two or less than two trainmen. It also authorized changes in branch line and yard crews irrespective of the number of persons theretofore employed in such crews. Px 1, p. 14, paragraph A(2), A(3). It also provided for the arbitration of disputes not resolved by agreement with respect to the number of persons to be employed in crews in which changes were authorized in accordance with certain specified guide lines; one of which was "practices regarding the consist of crews in comparable situations where such practices are not in dispute." Px 1, pp. 15-19. It also provided for protection of the employment of certain persons. Px 1, 19-20.

4. The CNW employs a total of 808 crews; 245 in main line service, passenger, or through freight service; 165 in branch line or local or way freight service and 398 in yard service. The Award of Arbitration Board 282 did not authorize any reduction in the 245 main line crews, although it did authorize changes in the branch line and yard crews, 67 main line crews, 52 branch line crews and 102 yard crews for a total of 221 crews were not subject to reduction under the law of Wisconsin. Thus, at the commencement of the dispute involved in this case there were a total of 587 crews employed by CNW outside the

State of Wisconsin; 178 in main line passenger or through freight service; 113 in branch line or way freight service and 296 in yard service.

5. Under the Award of Arbitration Board 282 CNW had obtained authority to employ a conductor and less than two trainmen in 72 out of a total of 113 branch line or way freight and local service which were employed outside the State of Wisconsin and to reduce to a foreman and less than two helpers 143 out of a total of 296 yard crews employed outside the State of Wisconsin, or a total of 215 crews and yard crews which were employed outside the State of Wisconsin. Tr. 220-224, 258, 289, 326-327, 353, 368, S.Tr. 226-233.

6. In July 1965 in pursuance of Section 6 of the Railway Labor Act the Union served on the CNW notice of its desire for an agreement to become effective on January 25, 1966, the day following the expiration of the Award of Arbitration Board 282, to provide for a minimum crew consist of not less than a conductor and two or in some instances three trainmen in all road service and of not less than a foreman and two helpers in yard service. Px 9, 10, Tr. 89, 226-227.

7. CNW refused to meet, confer, discuss or negotiate with the Union with respect to the Union's notices, on the ground they were legally ineffective, (J. R. Wolfe Aff. p. 11, Tr. 230,) after which, on October 4, 1965 the National Mediation Board, hereinafter "NMB", assumed jurisdiction of the dispute arising from the Union's notices, J. R. Wolfe Aff. p. 12.

8. On December 24, 1965 in pursuance of Section 6 of the Railway Labor Act, CNW served notice on the union of its desire for an agreement for CNW to have the unrestricted right to determine when and if trainmen should be used in each crew in road and yard service and if used, the number and classification of employees to be used and

for the elimination of all contrary agreements, rules, regulations and practices. Px 12.

9. CNW also proposed that if no agreement should be reached that the dispute arising from the union's July 1965 and CNW's December 1965 notices be referred by the unions' representatives on the CNW to a committee to be established by the union to handle those notices concurrently with other notices served by the union and by other railroads on the union for further handling on a national basis with a committee representing the railroads. Px 12.

10. The unions' representatives on the CNW met with representatives on CNW on January 18, 1966, discussed CNW's notice but declined to discuss the union's notice concurrently with and declined to agree to refer the dispute to a national committee to be handled on a national basis concurrently with committees representing the CNW and other railroads which had served the same notice on the union in December 1965.

11. Thereafter, at the request of CNW, the NMB assumed jurisdiction of the dispute arising from CNW's December 1965 notice as it did of disputes arising from notices served by other railroads on the union in December 1965.

12. The positions of the parties became the subject of litigation in Akron & Barberton Belt R. Co., et al. v. Brotherhood of Railroad Trainmen, 250 F.Supp. 691 (D.C., Mar. 3, 1966); 252 F.Supp. 207 (D.C., Mar. 28, 1966); 254 F.Supp. 306 (D.C., May 19, 1966) and Akron & Barberton Belt R. Co. v. Order of Railway Conductors & Brakemen, 253 F.Supp. 538 (D.C., April 19, 1966) in which CNW was a party plaintiff, for a declaratory judgment that the union's July 1965 notices were legally ineffective because they were served during the period the Award of Arbitration Board 282 was in effect and for an injunction

against a strike by the union over the dispute arising from its notices.

13. On October 4, 1966 while the *Akron & Barberton Belt* case, was pending on appeal, the NMB terminated its jurisdiction of disputes between Atlantic Coast Line, Boston & Maine and Des Moines Union R. Co., (now a part of CNW) and the union which arose from notices served by and upon the union and those railroads in 1965 which were the same as those served by and upon CNW and the union (Dx 1, p. 13). The railroads sought a declaratory judgment that the union had violated Section 2, First of the Railway Labor Act by not having bargained in good faith and by refusing to agree to national handling of the disputes arising from the aforementioned notices. Dx 1, pp. 2-34. The District Court found in favor of the union on the question of good faith bargaining but held the union had violated Section 2, First of the Railway Labor Act by refusing to engage in national handling of the dispute.

14. On May 12, 1967 the United States Court of Appeals for the District of Columbia Circuit decided the *Akron & Barberton Belt* cases (128 U.S.App.D.C. 59, 385 F.2d 581), reversed the decision of the District Court that the union's 1965 notice was legally ineffective because served on the railroads during the period the Award of Arbitration Board 282 was in effect; held that the union's notices were legally effective to impose upon the railroads their duty to bargain under Section 2 First of the Railway Labor Act and that the railroads, including the CNW, by refusing to enter into negotiations with the union on the union's 1965 notices, "had breached their statutory duty under the Railway Labor Act to confer and bargain"; that CNW and the other railroads had forsaken their right to insist on conferences and that the dispute properly had been advanced to mediation. (385 F.2d at 592, 594-598, 599.)

15. On September 6, 1967 the United States Court of Appeals for the D.C. Circuit decided the *Atlantic Coast Line* case [Brotherhood of Railroad Trainmen v. Atlantic Coast Line Railroad Co.], 127 U.S.App.D.C. 298, 383 F.2d 225 reversed the decision of the District Court, held the union did not violate any duty under the Railway Labor Act by refusing to agree to national handling of the crew consist dispute arising from notices served in 1965 by the union on some 80 railroads and the counter-notices served on the union by those 80 railroads. (383 F.2d at 226, 228-230).

16. In January 1968 the Supreme Court denied petitions by the railroads for writs of certiorari in the *Atlantic Coast Line* case, [Atlantic Coast Line Railroad v. Brotherhood of Railroad Trainmen] 389 U.S. 1047, 88 S.Ct. 790, 19 L.Ed.2d 839 and in the *Akron & Barberton Belt* case, [Akron & Barberton Belt Railroad Co. v. Brotherhood of Railroad Trainmen] 390 U.S. 923, 88 S.Ct. 852, 19 L.Ed.2d 983.

17. In January 1965, before the dispute in this case arose, the former Brotherhood of Railroad Trainmen, hereinafter referred to as "BRT", made an agreement with the New York Central, the Pennsylvania R. Co., and the Erie-Lackawanna Railroads and their subsidiaries with respect to crew consist which came to be known as the Luna-Saunders Agreement. It provided for a minimum crew of a conductor, two trainmen in road service and a foreman and two helpers in yard service and for crews of a conductor and less than two trainmen in road service or a foreman and less than two helpers in yard service which had been so established prior to January 24, 1964 to continue as such. Dx 1, pp. 213-215, 226-227, 402-406.

18. On March 22, 1965, the union made an agreement with the B & O R. Co., and its subsidiaries which came to be known as the Luna-Touhy Agreement. It was substan-

tially the same as the Luna-Saunders agreement. Dx 4, tab 2.

19. On August 11, 1966, the Reading R. Co., and the former BRT made an agreement resolving the crew consist dispute which arose from notices served by and upon the union and that railroad in 1965 which were the same as the notices served in 1965 by and upon the union and CNW and other railroads. That agreement, like the Luna-Saunders agreement provided for all road and yard crews to consist of a minimum of a conductor or foreman and two trainmen or helpers and for crews established at less than that number prior to January 25, 1964 to continue as so established. Dx 1, pp. 267, 422-425.

20. On September 16, 1967 the Southern Pacific Company made an agreement with the former BRT to establish a minimum crew consist in road service of a conductor and not less than two trainmen. Dx 4, tab 4.

21. On March 19, 1968 the President of the BRT met with the President and Chairman of the Board of CNW and discussed the crew consist dispute. The result of the meeting was an agreement for the parties to study the crews which had been working with less than a conductor and only one trainman in road service and a foreman and one helper in yard service and for the CNW Vice President of Personnel James R. Wolfe to meet with the union's general chairmen in May, June, July and August to try to settle the dispute. Tr. 239-40

22. In March 1968 an agreement which became known as the "Jacksonville Agreement" was made by the union with the Missouri Pacific Railroad Company, the Seaboard Coast Line Railroad Company and the Southern Railway Company with respect to the crew consist dispute. That agreement provided for the railroads to select 50% of the crews which had been reduced to less than two trainmen in road service and two helpers in yard service, im-

mediately to be increased to a minimum of two trainmen and two helpers and for the remaining 50% to be subject to negotiation and if no agreement should be reached, for the dispute to be referred to the Presidents of the union and the railroads and if not resolved by them for the parties to revert to their self-help positions. Px 4, tab 5. A final agreement was reached without the dispute being referred to the Presidents of the union or of any of the railroads. Px 4, tabs 8, 10, 11, 12, 13 and 14.

23. Other final agreements were made resolving the crew consist dispute arising from the 1965 notices between the GM & O R. Co., on February 22, 1968 and the Union Pacific on March 1, 1968.

24. There were no negotiations between CNW and the unions representing its employees with respect to the merits of the crew consist dispute arising from their 1965 notices from the time the union's notice was served in July 1965 until May 16, 1968. Tr. 239-242

25. On March 8, 1968 CNW sent a letter to the union's representatives and to all of its train service employees on March 13, 1968 proposing an agreement for CNW to retain the authority it had obtained pursuant to the Award of Board 282 to man 215 crews with less than two trainmen in road service and two helpers in yard service and pay an additional $3.45 to each employee who worked in such a reduced crew. Px 14, 15. The union's representatives rejected the proposal as contrary to the policy of the union to substitute money for a safe crew complement, Px. 13, which was in accordance with the policy adopted by the former BRT prior to its merger into UTU on January 1, 1969 which was confirmed by the President of the former BRT in his testimony in the Atlantic Coast Line case, Dx 1, pp. 161-165, 227, 376-377, 416-417 and in his testimony in Louisville & Nashville R. Co. v. United Transportation Union (J. R. Wolfe aff. p. 17).

26. The Constitution of the UTU into which the BRT was merged on January 1, 1969 contained no restrictions and there were no directives restricting the consideration of money in the resolution of the crew consist dispute. S.Tr. 251, 295-299

27. Representatives of the union and CNW met on six occasions, on May 16, June 12, June 20, July 17, August 6, and August 8, 1968 during which they discussed yard crews on the basis of studies made by CNW. At their last meeting in which the union's Vice-President Tuffley participated, the union urged resolution of the dispute on the basis of agreements made on other railroads which was rejected by CNW which insisted upon resolution of the dispute on the basis of a study of each individual crew, Tr. 247, and that there had been no discussion of main line or branch line crews which the CNW desired to reduce under its notice of December 1965.

28. The union's Vice President then suggested calling in the National Mediation Board, hereinafter "NMB", Tr. 248.

29. The next day Maloney told Wolfe over the telephone that road jobs should be discussed before calling in the NMB and he would call Wolfe for further conference.

30. There were no further conferences between CNW and the union until April 22, 1969 because the union had struck the Belt Railway of Chicago over the crew consist dispute; Wolfe was engaged in negotiating agreements incident to the merger of the Chicago Great Western into the CNW; the union had called a strike against the Louisville & Nashville R. Co., over the crew consist dispute and the President had appointed an Emergency Board to investigate the crew consist dispute between the union and the Belt Railway; the Louisville & Nashville R. Co., and the Illinois Central R. Co. Wolfe and Maloney agreed

to postpone further conferences until after the Emergency Board made its report. J. R. Wolfe Aff. 18-21. Tr. 240, 242-249, 254-255.

31. On April 14, 1969, the day after the Illinois Central had made an agreement with the union, Maloney called Wolfe for further conferences saying the President of the union was after him to get moving and they agreed to meet April 22, 1969. J. R. Wolfe Aff. 21, Tr. 255.

32. CNW and the union met on April 22 and 30, May 9 and 15, 1969, on which latter date they received notice a NMB mediator would arrive June 2, 1969 to commence mediation of the dispute. During those meetings the union's representative told the CNW it was the last railroad with which the crew consist dispute existed and the union's President was "champing at the bit" for a settlement to be made. The union urged an agreement similar to agreements made by other railroads, particularly those made by other railroads operating alongside the CNW. The CNW took the position that all CNW crews had not been discussed with union representatives on districts other than the CNW Proper. The union's representatives on all the other CNW districts were called in and took the same position—that there was no need for a discussion of every CNW crew in view of the precedent set by agreements other railroads had made with the union, particularly those operating in the same terminals and same areas as the CNW but would be agreeable to variations elsewhere. J. R. Wolfe Aff. 24-25, 28-29; Tr. 260-261, 263, 267, 270-272.

33. In December 1969, CNW was familiar with agreements between the union by other railroads operating in the same place and alongside the CNW and considered that those agreements established a same general rule of returning 90% of the crews, consisting of a conductor and one trainman in road service and a foreman and one helper in yard service to two trainmen and two helpers

and that all of the agreements established a national pattern of between 93 and 100% of the crews which were reduced to one trainman in road service and one helper in yard service being increased to crews consisting of two trainmen and two helpers. Tr. 345-347.

34. On June 2, 1969 Arthur Glover, a veteran mediator of the NMB commenced efforts to mediate the dispute. He first met with CNW's Vice President, J. R. Wolfe and reviewed the negotiations. Wolfe told him the union had taken the position in the Atlantic Coast Line case that the crew consist dispute should be settled on each railroad because of the differences in climate, terrain, hills, curves, etc., but the union had refused to discuss those matters and was insisting on increasing all crews reduced by CNW to a conductor and one trainman in road service and to a foreman and one helper in yard service by adding an additional trainman and/or helper on the ground that other railroads had made such agreements.

35. Wolfe stated the CNW should study each road crew which had been working with only one trainman and each yard crew that had been working with only one helper and then each such crew should be discussed by CNW and the union. Mediator Glover and Wolfe agreed to meet the next day, June 3, 1969. At that time Mediator Glover asked Wolfe how long it would take CNW to make the crew studies it desired. Wolfe stated he thought there should be a study of every job. Mediator Glover said the union would not stand for that. CNW then suggested a recess for two weeks during which CNW would try hard in the next two weeks, to study 50 of the 180 crews working with only one trainman or helper. Later that day, Mediator Glover advised he wanted to meet both sides the next day. Tr. 273-277.

36. Representatives of the CNW and the union met with Mediator Glover on June 4, 1969. At Glover's request CNW stated the reason for the two week recess it desired

for crew studies was to try to show the union why it should not insist on increasing the reduced crews based on what other railroads had done. The union took the position that the studies would not help in reaching an agreement. Wolfe was cognizant that even with a time and motion study of a particular crew there could be a basis for a difference of opinion whether the crew should consist of two trainmen or only one in road service and of two helpers or only one in yard service (Tr. 32-3). The union took the position that it would continue to insist on agreements which other railroads had made without crew studies, particularly agreements such as had been made by railroads operating in the same terminals and alongside the CNW, such as the agreement which the Great Northern & Milwaukee had made. However, the union agreed to the recess desired by CNW to make its crew studies. Tr. 275-278.

37. The CNW and Union representatives next met on June 18, 1969 with two Mediators—Glover and Willetts. CNW had completed its studies of 45 of the 50 crews. The union was aware of the crews which CNW had studied but again questioned the worth of the studies in view of what agreements other railroads had made. The union then submitted a written proposal which its representatives stated was based on its own study of the crews.

38. The union's proposal (PX 16) was for main line local freight crews to consist of a minimum of a conductor and three trainmen; for other main line freight crews to consist of a minimum of a conductor and two trainmen; for yard crews to consist of a foreman and two helpers and for suburban passenger crews to consist of a minimum of a conductor and one trainman on trains of three or less cars and a conductor and two trainmen on trains of four or more cars, which was considered to conform to a national pattern of increasing 98% of crews in which only a trainman or helper had been employed

to two trainmen or two helpers. (J. R. Wolfe Aff. 33, Tr. 280-282, 285-286). The Mediators then asked for a proposal by CNW.

39. The CNW submitted its first written proposal to the union pursuant to the suggestion of the Mediators, on June 20, 1969. It was for a continuation of the authority CNW had obtained pursuant to the Award of Arbitration Board 282 to employ a foreman and one helper to be continued in yard and branch line crews, except for five yard crews in which a minimum of a foreman and two helpers would be required and crews employed on three branch lines would be a minimum of a conductor and two trainmen; that 63 yard crews in which two helpers had been employed be reduced to a minimum of a foreman and one helper; that the crews on 30 way freight or switch run crews, which had consisted of a conductor and two trainmen be reduced to a conductor and only one trainman, for all crews employed in main line through freight trains making less than five pickups or setouts to consist of a minimum of a conductor and only one trainman.

40. The proposal would have authorized the CNW to employ only one trainman or helper in 350 to 400 crews outside Wisconsin, although it had authority, pursuant to the Award of Arbitration Board 282 to employ only one trainman or one yard helper in only 215 crews outside Wisconsin. It also provided for arbitration of any future dispute with respect to changes in the number of persons to be employed in any crew. That proposal was discussed and rejected by the union. J. R. Wolfe, Aff. 34 Tr. 291, 302-303, 351-358.

41. On June 23, 1969 Mediator Willets and CNW's Wolfe had some private discussion and Mediator Willets handed Wolfe a second proposal by the union (PX 17). That proposal was a concession from the union's first proposal (Tr. 289) and was for all yard crews to consist

of a minimum of a foreman and two helpers except for eight crews in which only one helper should be employed, for all road crews to consist of not less than a conductor and two trainmen except that the crews employed on way freight trains operating between three specified points should consist of a conductor and three brakemen and for crews on passenger and suburban service to consist of a minimum of a conductor and two brakemen except crews on trains of three or less cars which should consist of a conductor and only one brakeman.

42. On June 25, 1969 with Mediator Willets the proposals of the Union and CNW were discussed at length—each party explaining why it could not accept the other's proposal. CNW brought up the absence of a proposal by the union to change main line crews saying the Award of Arbitration Board 282 did not go far enough with respect to changes in main line crews. The union took the contrary position and would not discuss changes in main line crews. J. R. Wolfe Aff. 35, Tr. 285, 289, 303-304.

43. On June 30, 1969 CNW made its second proposal to the Union (PX 20). It was a concession from its prior proposal (Tr. 365) and was that it should continue to have the authority which it had acquired pursuant to the Award of Arbitration Board 282 except that five yard crews in which one helper was employed be increased to two helpers, that five yard crews in which two helpers were working be reduced to one helper, that three specified branch line crews in which only one trainman was required to be increased to two trainmen that the crews on three other trains in which a conductor and two brakemen were employed be reduced to one brakeman and for arbitration of any dispute as to future changes in any crews. PX 20, Tr. 260-262. It was rejected by the union; one of the grounds was the proposal for arbitration Tr. 296-299.

44. On July 1, 1969 the union submitted its third written

proposal to CNW, it was the same as the union's second proposal except that it added three additional yard crews to consist of a foreman and only one helper (PX 18) and thus proposed 175 yard crews consisting of a minimum of two helpers and five crews to consist of only one helper (PX 18). CNW acknowledged it was a retreat by the union but still was well above the 80% of the crews which the Union's General Chairman Maloney originally offered, Tr. 22, 287, 363-364. Also on the same day CNW submitted its third written proposal to the Union (PX 21). It was the same as CNW's second proposal but omitted any provision for arbitration of future disputes concerning the consist of crews, Tr. 290, 364. CNW also submitted four other proposals, PX 22, proposing arbitration of the consist of all train and yard crews, PX 23, which was a request for the union to state what work rules it would be willing to trade for an agreement by CNW to add a second man to crews in addition to those which CNW in its proposal No. 3 offered to increase from one to two road trainmen or yard helpers and its proposal No. 6 for the union's crew consist demand to be held in abeyance for one year and for the union not to serve new crew consist demands except by mutual agreements or through regional or national handling in return for a five day work agreement for employees in suburban service upon specified conditions which should not be subject to change for three years.

45. CNW and the union met with one or both mediators on four days between June 26 and July 2, 1969. The CNW crew studies and pros and cons of crew consist studies and the proposals of the parties, including the union's proposals of an agreement like agreements on other railroads had made particularly the Milwaukee and Great Northern were discussed and argued and each party rejected the proposals of the other. On July 2, 1969 the union handed a letter to Mediator Glover confirming the exchange and thorough discussion of the several proposals, that the

union diligently strove for a settlement but the CNW proposals evidenced a backward position and were unacceptable and that the parties were hopelessly deadlocked but that the union would comply with any decision the Mediator might make. PX 25. Later that day Mediator Glover announced that mediation had failed. J. R. Wolfe Aff. 36, Tr. 304-308.

46. Voluntary arbitration was proffered by the NMB on October 10, 1969 which the CNW accepted and the Union rejected (Tr. 310-311) and on October 16, 1969 the NMB terminated its jurisdiction of the dispute. DX 7.

47. On November 10, 1969 the Union's Vice President Tuffley asked CNW's Vice President Wolfe to resume negotiations. Wolfe said he would not care to bargain under the threat of a strike and Tuffley assured Wolfe there would be no strike while negotiations were in progress and they agreed to and did resume negotiations commencing November 12, 1969 which continued thereafter every day through November 18, 1969. During the first two days they identified all the crews on the CNW System which CNW had been authorized to man with less than a conductor and two trainmen on road service and less than a foreman and two helpers in yard service and which of them were in fact working with two trainmen or helpers with a conductor and with less than two trainmen in road service and a foreman and with less than two helpers in yard service. DX 2 and 3. Main line crews which were not subject to change under the Award of Board 282 were not listed because Tuffley said he was not willing to discuss them. J. R. Wolfe Aff. 37, Tr. 318-21, 329). During the six days of negotiations Wolfe and Tuffley discussed all of the 216 crews the CNW had been authorized to reduce under the Award of Board 282 and the positions of the parties with respect to changes in the number of persons to be employed in those crews. The

result of those discussions was that the union wanted all but 36 crews to be increased from one to two road trainmen or yard helpers which CNW considered was consistent with General Chairman Maloney's original demand that 80% of the crews employed on the CNW "Proper" District consist of not less than two road trainmen and two yard helpers. J. R. Wolfe Aff. 37, DX 3 and 4; Tr. 314, 316-318-321, 329, 331.

48. Commencing on September 9, 1971 after this case was remanded by the Supreme Court, CNW and the union have engaged in 32 formal negotiating conferences, S.Tr. 15.

49. At the outset the union agreed to CNW's proposal to negotiate with respect to every crew employed by CNW in main line, branch line and yard service upon criteria such as work done by each crew, safety and other, such as the guidelines established by Board 282, irrespective of the percentage of crews which other railroads had agreed to increase from one to two or more trainmen. The union also agreed to consider in the negotiation and its conclusion as to whether a crew should consist of less than two trainmen or two yard helpers additional pay for persons employed on crews of less than two road trainmen and two yard helpers. It was then agreed that CNW would prepare a list identifying all the crews it employed, what each crew did and which of the crews it was authorized to work with less than two trainmen or yardmen and furnish that information to the union's negotiators, with a statement of CNW's position with respect to what should be the consist of the crew after which the union would present its position with respect to each crew. S.Tr. 16-18, 74-77, 125-126, 223-224, 249-253.

50. CNW commenced preparing a list of the crews employed first yard crews, and branch line, local and way freight crews and then main line through and local crews. As the lists were completed they were submitted to the

union's representatives on September 15, 16 and 17 who checked them and any questions were resolved and by September 20, 1971 the parties had agreed to the accuracy of the total number of crews and the service in which they were employed, as stated in paragraphs Nos. 4 and 5 of these findings. S.Tr. 91-94, 223-233.

51. While the parties were verifying the identification of crews the union asked CNW what about the sharing of savings from crews which might consist of less than two trainmen or yardmen and how much the CNW was considering and whether it would be part of the basic pay of the employee and CNW replied about $4.00 for conductors and $3.00 for trainmen. S.Tr. 95, 250-251.

52. On September 21st (S.Tr. 94, 118, 233) the CNW commenced its presentation with respect to yard crews. CNW stated what work the crew did, whether it was a transfer job, hump work, flat switching, industry switching and whether the work done by the crew was the same or a different type of work from time to time (S.Tr. 78-85) and what it considered the consist of the crew should be, either two or one helpers. After CNW completed its presentation as to yard crews it then proceeded with its presentation of the work of road service crews, through freight, local and way freight on branch and main lines and on October 1, 1971, 7 or 8 conference days later, CNW completed its presentation with respect to all 808 crews including 221 crews in Wisconsin. S.Tr. 118-127, 233, 236.

53. During the CNW's presentation the union took issue with and argued with CNW's statement of facts and its conclusions with respect to certain crews and agreed as to others. S.Tr. 123-26, 239.

54. The union then made its presentation in about five conference days commencing on October 4, 1971 and completing it on October 8, 1971. S.Tr. 137, 139. At the outset the union suggested that, although all 808 crews had been

discussed during CNW's presentation, including 221 which worked in Wisconsin, since those employed in Wisconsin could not effectively be changed because of the Wisconsin law, that the union's presentation be limited to crews employed outside Wisconsin, to which CNW agreed. S.Tr. 236-237. Also, the union stated that, since CNW's total position was for 436 out of 587 crews employed outside Wisconsin to consist of less than two road trainmen or two yard helpers and for the other 151 should consist of two helpers, the union's presentation would be limited to those 436 and that the union's position would be presented by its general chairmen and local chairmen on the basis of the personal knowledge of the work done by those crews. S.Tr. 128, 237-238.

55. Throughout the negotiations the union was represented by its Vice President Tuffley; General Chairman Maloney who represents CNW's conductors, trainmen and yardmen, employed on CNW Proper, the former Chicago Great Western and the former Minneapolis & St. Louis and by General Chairman Roessler who represented trainmen and yardmen on the former Chicago, St. Paul, Minneapolis & Omaha. S.Tr. 219-220. The Union discussed each of the 436 crews which worked outside Wisconsin and which the CNW, in its presentation, proposed should consist of less than two trainmen or yardmen. The union agreed with CNW's position on some crews and stated their objections and the reasons for their objections for certain crews to consist of not less than two trainmen or yardmen. From time to time CNW representatives raised objections and expressed their views in opposition to the union's position on particular crews as the union had done during the CNW's presentation. To further substantiate its position and that of its general chairmen, the union produced six local chairmen, two of them formerly had been General Chairmen, R. E. Stahley, formerly had been General Chairman on Chicago Great Western, repre-

senting all employees on the Chicago Great Western and is now a local chairman representing CNW employees in Minneapolis-St. Paul; R. E. Stanley, who had been General Chairman on the Minneapolis & St. Louis and is now a local chairman and five other local chairmen, representing roadmen and yardmen in the Galena Division of CNW, including Chicago Freight Terminal, Peter Kozoyad and David Gray representing roadmen and yardmen employed in CNW's Wisconsin Division, R. J. Keller who represents yardmen in the Chicago Freight Terminal, W. A. Burke of Boone, Iowa and his brother William Burke, both of whom represent roadmen and yardmen in Iowa. S.Tr. 240-242. Those representatives of the union stated arguments for the union's position and their objections to CNW proposals and the reasons for each with respect to particular crews in addition to those stated by the union's general chairmen Maloney and Roessler. S.Tr. 128-133, 239-240. CNW acknowledged that the union's representatives who participated in the discussion had the opportunity and experience to have knowledge of the work done by the crews involved. S.Tr. 130.

56. The discussion of main line crews was more thorough than the discussion of other crews. S.Tr. 139. The union's reasons for not agreeing to CNW's proposal for changes in main line crews were that through freight trains required constant observation by two men, one on each side of the caboose, because such trains are long and operate at high speeds and by having constant observation on both sides at the rear, brake rigging that might drop down, loads shifting, hot boxes which cause journals to burn off, could more readily be detected, particularly at night and in snow and dust and damage and injury could be prevented; also that draw bars and air hose which break could more readily be found and repaired; that such trains consist of blocks of cars and present more and dangerous difficulties for the crew in picking up cars to be added to a block of

cars at intermediate stations. S.Tr. 58-59, 264-274. CNW acknowledged that brake rigging does drop down and drags under the car, that hot boxes do develop and journals do burn off and that air hoses and draw bars do break, as claimed by the union. S.Tr. 139-144.

57. At the conclusion of the presentations by CNW and by the union, every crew had been discussed and the views of each had been stated with respect to each crew. S.Tr. 133.

58. Almost every day, from the beginning of negotiations on September 9, 1964 the question of additional pay for employees working in crews of less than two trainmen or yardmen was discussed, but CNW made no definite money proposal until October 8, 1964, S.Tr. 95-106, 252-254. At some point in the negotiations CNW renewed its 1968 offer to pay an additional $3.45 to employees working in crews of less than two trainmen or yardmen rather than to increase the number of men in crews was confirmed and rejected by the union. S.Tr. 60, 96. On September 16 and 17, 1971 CNW suggested paying an additional $4.00 to conductors and $3.00 to trainmen working in crews of less than two trainmen and that the amount might be increased depending on how many one trainmen crews should be agreed upon but did not answer the union's question whether the additional amount would be part of basic pay of the conductor and trainmen, S.Tr. 95-96, 245, 252-254. At some point the union also asked CNW if it would agree to a rule such as contained in the agreement between the former Milwaukee & St. Louis and the ORC&B for a conductor working without a trainman to be paid what the absent trainman would have made was discussed and labeled a "bastard" rule by CNW and was not a sharing such as CNW was talking about with respect to crews in which less than two trainmen should be employed. S.Tr. 102-105.

59. On October 16, 1971 CNW presented its first proposal to the union. It did not deal with crews employed in Wisconsin although those crews had been discussed it also had been agreed during negotiations that since those crews could not be changed because of the Wisconsin law the parties would deal only with crews employed outside Wisconsin and its proposals excluded those crews. S.Tr. 23-26. The proposal was that out of 144 main line crews which had not been subject to change under the Award of Board 282 to consist of less than two trainmen and for 109 branch line crews or 37 more than the 72 authorized by Board 282 to consist of less than two trainmen and for 183 yard crews or 40 more than authorized by the Award of Board 282 consist of less than two helpers and thus CNW to be authorized to employ less than two trainmen or yardmen for a total of 436 crews or 221 more than the 215 it was authorized to work with under the Award of Board 282 less than two trainmen or yardmen. S.Tr. 28-32.

60. The proposal with respect to the number of crews was made verbally, the remainder of the proposal is PX 26 which provided for the payment of an additional $4.00 to be paid to yard foremen and $3.00 to yard helpers working in a crew of less than two helpers and an additional four cents per mile to be paid road conductors and an additional three cents per mile to be paid road trainmen for each mile over 100 which they worked in crews of less than two trainmen. It also contained provisions for pay for employees desiring to terminate their employment and for protection of employment of those who continued in service, etc., S.Tr. 29030, 34-36, 106. The CNW's first proposal was discussed in detail. S.Tr. 260.

61. On October 22, 1971 the union made its first proposal DX 8, S.Tr. 30-31, 261. It was for all road crews to consist of a conductor and two trainmen and except for 28 branch line locals and way freight, crews to consist of only one trainman and for all yard crews to consist of a

foreman and two helpers except 31 identified yard crews or a total of 59 crews to consist of less than two road trainmen or two yard helpers. S.Tr. 261-262. The reasons the union made no proposal with respect to main line crews were those mentioned in paragraph 56 of their findings which were discussed with CNW. S.Tr. 264-275, 139-145, 148-149.

62. On October 23, 1971 CNW made its second proposal. It was for 211 road crews to consist of less than two trainmen and 171 yard crews to work with less than two helpers. PX 27, S.Tr. 30-31, 150.

63. On November 9, 1971 CNW made its third proposal which was for 172 road crews to consist of less than two trainmen and 152 yard crews to consist of less than two helpers. PX 28, S.Tr. 37.

64. On November 11, 1971 the union verbally proposed an agreement that, since CNW was actually using two trainmen or yardmen on 35 of the 215 crews it had been authorized to reduce under the Award of Board 282, 90 of the remaining 180 crews, to be selected by CNW, immediately be restored to two road trainmen or yard helpers and negotiations continue with respect to the remaining 90 for a period of time to be agreed upon, an agreement similar to the Jacksonville agreement. CNW considered it overnight and rejected it. S.Tr. 153-158, 275-279.

65. On November 12, 1971 CNW presented its fourth proposal (PX 38, S.Tr. 38) which was for 142 road crews and 135 yard crews or a total of 324 crews to consist of less than two trainmen or yard helpers, PX 28, S.Tr. 38, 161.

66. After CNW's proposal was discussed, the union verbally proposed a variation of the "Jacksonville Agreement" and was for half of the 215 crews CNW was authorized, under the Award of Board 282, to work with less

than two trainmen or yardmen or 107 or 108 immediately to be increased to two road trainmen or yard helpers and for negotiations to continue for a period of time as to the remaining 107 or 108 and thus added 17 more crews for further negotiation. As the union saw it, with the 59 crews it had offered to agree should be less than two road trainmen or yard helpers and the 32 crews CNW was manning with two trainmen or yardmen although authorized to man them with only one, the crews for further negotiation would be much less. It was rejected by CNW. S.Tr. 161-163, 280-282.

67. On November 15, 1971 CNW made its fifth proposal (PX 30, S.Tr. 161-163) which was for 63 main line crews and 51 branch line road crews or a total of 114 road crews and 100 yard crews or a total of 214 crews consisting of less than two trainmen or two yard helpers. PX 31-32.

68. During the discussions of the proposals of the parties between October 17, 1971 and November 15, 1971 there were further discussions of what money the CNW would pay men working in crews of less than two trainmen and two yardmen. CNW's offer of $4.00 for road conductors and yard foremen and $3.00 for road trainmen and yard helpers was in connection with its November 9, 1971 proposal for 436 crews to be less than two trainmen and yardmen and after that the union's General Chairman Maloney asked how much more CNW would pay to which CNW replied it would depend on how many of the 436 crews the union would agree to consist of less than two road trainmen or yard helpers, S.Tr. 168. The union's General Chairman Maloney suggested $15.00 each for the road conductor or yard foreman and one trainman and one yardman to which CNW agreed but then the union said there were other considerations such as safety and the subject was not pursued. That money was offered on the condition that 436 jobs would be operated one and one. S.Tr. 168-172, 254-258.

69. On November 17, 1971 CNW made its proposal number six. It gave the union an option which basically was for CNW to retain the authority it had obtained to employ less than two trainmen in road service and less than two helpers in yard service in 214 or 215 crews for the establishment of a procedure for studying the crews thirty at a time and if no agreement should be reached for arbitration of the dispute until an agreement should be reached as to all or part of the crews or the size of the crews determined by arbitration. The proposal was rejected by the union on November 18, 1971. PX 31, S.Tr. 39-42, 283-288.

70. CNW by its refusal to meet and negotiate with UTU's predecessor BRT with respect to Section 6 notice served by UTU's predecessor in June, 1965 and its conduct during the pendency of and since the decision of the *Akron & Barberton Belt* and *Atlantic Coast Line* cases demonstrated an intent not voluntarily to make an agreement with the union prior to September 9, 1971.

71. CNW first refused to meet until the Awards of Arbitration Board No. 282 had expired. Such refusal was held to violate the Railway Labor Act and Section 8 of the Norris-LaGuardia Act in BRT v. Akron & Barberton Belt R. Co., D. of Col., 385 F.2d 581, 599, 613 (1967). It then insisted on only national negotiations. This insistence was rejected in BRT v. Atlantic Coast Line R. Co., D. of Col., 383 F.2d 225, 229 (1967).

Notwithstanding the *Atlantic Coast Line* case, CNW maintained its position that individual agreements were invalid because the crew consist dispute should have been resolved by a single National agreement. (Tr. 415-418). At the same time in its negotiations with the union, subsequent to the decision of the *Atlantic Coast Line* case, CNW has refused to consider or give any credence to agreements made by other individual railroads with the union even though CNW considers such as establishing a

"National Pattern". It also has refused to consider or give any weight to agreements affecting railroad operations in the same terminals with the CNW (S.Tr. 18) and, instead, has insisted on negotiating with the union on a crew by crew basis upon the basis of its studies of the work of each CNW crew.

72. The union, since its predecessor BRT served its notices on CNW and its predecessors in pursuance of Section 6 of the Railway Labor Act, in its negotiations with CNW since September 9, 1971 has negotiated with a genuine intent and desire to obviate CNW's objection to its negotiations and voluntarily to reach an agreement with CNW resolving the crew consist dispute arising from the union's aforementioned notice and the notice served by CNW and its predecessors pursuant to Section 6 of the Railway Labor Act in December, 1965.

73. In its Findings of Fact and Conclusions of Law of August 13, 1971, the court found that in the prior negotiations between the parties defendant union at all times (a) refused to negotiate over the carrier's proposals to reduce the size of mainline crews; (b) refused to negotiate over the carrier's proposals to settle the crew consist dispute by an agreement that would involve the payment of additional compensation to employees working on crews of one conductor and one brakeman; and (c) refused to negotiate any agreement that deviated substantially from the pattern of agreements reached with other railroads requiring approximately 95% of all crews to be operated with a minimum of one conductor and two brakemen. (Findings of Fact Nos. 11, 14, 15, 21; Conclusion of Law No. 3).

74. After the Court's decree of August 13, 1971, the parties conducted a series of 32 negotiating conferences between September 9 and November 17, 1971. (Testimony of J. R. Wolfe, Tr. 16, 26, 43, 72-74, 93-94, 118-126).

75. The carrier's proposals, contained in its original bargaining notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156), generally called for unilateral determination by the carrier of the size of crews. During the negotiating conferences referred to in Paragraph 74 above, the carrier made six successive offers to settle the dispute. The substance of those offers was as follows:

(a) Of a total of 808 road and yard crews, 435 would be operated with a minimum of one conductor and one brakeman, to whom would be paid an additional $4.00 and $3.00 per day, respectively.

(b) Of a total of 808 road and yard crews, 382 would be operated with a minimum of one conductor and one brakeman.

(c) Of a total of 808 road and yard crews, 324 would be operated with a minimum of one conductor and one brakeman.

(d) Of a total of 808 road and yard crews, 277 would be operated with a minimum of one conductor and one brakeman.

(e) Of a total of 808 road and yard crews, 214 would be operated with a minimum of one conductor and one brakeman.

(f) Of a total of 808 road and yard crews, all crews would be operated with a minimum of one conductor and two brakemen except for the 214 that the carrier had identified in its last previous offer or the 215 presently authorized to operate with less than two brakemen. The union could opt whether initially the 214 or the 215 crews should be manned with less than two brakemen. Then, the union could secure negotiation and, if that failed, binding arbitration, as to whether the crews manned with less than two brakemen should be manned with two brakemen. (Testi-

mony of J. R. Wolfe, Tr. 21, 30-42, 60-61; testimony of Francis D. Tuffley, Tr. 246-49, 259-61, 274-75, 279-80, 282-87).

76. The union's proposals, contained in its original bargaining notices under Section 6 of the Railway Labor Act, generally called for a minimum crew consist of one conductor and two brakemen on all crews. During the parties' negotiations prior to the commencement of this action, the union offered to settle the dispute by an agreement requiring all but 48 out of 750 crews—93.6%—to be operated with a minimum of one conductor and two brakemen. During the parties' negotiating conferences referred to in Paragraph 74 above, the union made two offers, the substances of which were as follows:

(a) All but 59 out of 808 crews—92.7%—would be operated with a minimum of one conductor and two brakemen.

(b) The parties would agree to the so-called "Jacksonville formula," under which one-half of the existing, or authorized crews with a minimum of one conductor and one brakeman would be augmented shortly by an additional brakeman, with the balance of the "one-and-one" crews subject to negotiation for a further specified period of time before the parties would be free to engage in self-help if unable to arrive at an accord. This formula, which was agreed to by other railroads under strike or threat of strike, has in the past resulted in final agreements under which approximately 95% of all crews are to be operated with a minimum of one conductor and two brakemen. (Testimony of J. R. Wolfe, Tr. 20-22, 42-52, 65-66, 134-35, 153-62; testimony of Francis D. Tuffley, Tr. 261-63, 272, 275-82, 308-09, 312-14).

77. In addition to the offers of the parties discussed in Paragraphs 75 and 76 above, one of the union's General

Chairmen on the carrier offered an agreement by which 435 out of 808 road and yard crews could be operated by the carrier with a minimum of one conductor and one brakeman, provided the carrier paid $15 per day to each of the two men in these smaller crews. When the carrier accepted that offer, the union's national Vice President nevertheless refused to permit any agreement to be made on that basis. (Testimony of J. R. Wolfe, Tr. 61-63, 112-13, 116-17, 168-71, 191; testimony of Francis D. Tuffley, Tr. 256-57, 299-302). The Court finds neither side seriously considered this offer. It was mere dickering between the parties.

78. At no time during the negotiating conferences referred to in Paragraph 74 above did the union offer to permit a single mainline crew to be operated with a minimum of one conductor and one brakeman. (Testimony of J. R. Wolfe, Tr. 47, 53-59, 173; testimony of Francis D. Tuffley, Tr. 263-64, 302).

79. The defendant union consistently took the following positions:

(a) that it would not agree to any proposal by the carrier for reductions in the size of mainline road crews;

(b) that it would not agree to any proposal by the carrier which included additional compensation to men working on crews of one conductor and one brakeman; and

(c) that it would not agree to any proposal by the carrier which deviated substantially from the pattern of agreements reached with other railroads requiring a minimum of one conductor and two brakemen on approximately 95% of all crews. (Testimony of J. R. Wolfe, Tr. 19-22, 43-55, 58-67, 109-13, 116-17, 134-35, 153-62, 168-71, 173-74, 191, 207-08; testimony of Francis D. Tuffley, Tr. 256-57, 275-82, 288-89, 301-02).

80. At the conclusion of the negotiating conferences referred to in Paragraph 74 above, the carrier requested the union to join with it in asking the National Mediation Board to assign a mediator to resume mediation in this dispute. The union refused. (Testimony of Francis D. Tuffley, Tr. 287-88, 292).

81. This Court has taken evidence and made these extensive and detailed findings of fact for the reason that this is a case of first impression, it being the first occasion when the Supreme Court or any other Court has decided that a District Court has the obligation of going behind the negotiations of a union and a railroad after mediation efforts have been exhausted.

It is clear that in this case neither of the parties bargained in good faith prior to September 9, 1971. Each took its position and refused to change its position. There was little communication between the parties. Each assumed that the other was completely in error. Each assumed that its position was correct. When the cause first came before the Court in 1969, this Court assumed that the question of good faith bargaining was to be determined by the mediator assigned to the case, as the law had always been construed up to that time. The Supreme Court held that the parties were required to bargain in good faith and that if either party charges that the other has not done so that the trial court must hold a hearing and make a finding of fact upon the question before either party may resort to self-help in this case. The Supreme Court thereupon returned the cause to this Court for such a hearing. The parties proceeded to begin bargaining on September 9, 1971 and continued until the present time.

82. In the original hearing before this Court each of the parties had introduced evidence concerning the facts about bargaining between the parties before and after NMB withdrew from mediation. This Court, in accord-

ance with the law as it was at that time found that the defendant union has served the section six (6) notice under the Railway Labor Act and had engaged in extensive negotiations with the plaintiff railroad and that NMB had terminated its services more than thirty (30) days prior to the notice of defendant that the members, the employees of the plaintiff, intended collectively to withdraw peacefully from employment by plaintiff until their demands under said section six (6) of the National Railway Labor Act were acceded to.

After making that finding of fact this Court concluded that the defendant union had in every way conformed to all of the provisions of the National Railway Labor Act that it was lawfully entitled to resort to self help and withdraw its members peacefully from the employment of the plaintiff railroad, or to put it more realistically to call a strike.

The plaintiff railroad had charged that the defendant union had not bargained in good faith as required by section two (2) of the National Railway Labor Act. The defendant union had denied the charges and answering had charged that the plaintiff railroad had not bargained in good faith under said section two (2) of the National Railway Labor Act. The plaintiff railroad replied and denied defendant union's counter charge.

The Court took evidence from the parties on the charges and counter charges of the parties.

This Court considered that the question of good faith bargaining was for the National Mediation Board, and that since it had terminated its services that this Court was barred from granting an injunction upon that question or any other under all of the facts before the Court, and that therefore the Court was without jurisdiction to issue an injunction against the defendant union prohibiting it to strike pursuant to the Norris-LaGuardia Act, 29

U.S.C. § 101 et seq. Accordingly this Court dismissed plaintiff's complaint for want of jurisdiction.

83. When the Supreme Court heard the case it did not have before it any of the record of the hearings before this Court upon the issue of good faith bargaining. It therefore reviewed only this Court's order in which it denied plaintiff railroad's prayer for an injunction against defendant union calling a strike against plaintiff railroad.

Upon receiving the mandate from the Supreme Court ordering this Court to reinstate the complaint, the court reinstated said complaint and called the case for further proceedings.

84. The cause came on for hearing upon August 13, 1971. The Court called upon the plaintiff railroad to offer evidence in support of its charge that defendant union had not bargained in good faith. The plaintiff stated that it had no evidence to present but chose to rely upon the evidence adduced before this Court prior to December 11, 1969, the date upon which this Court had entered its fiscal decree dismissing plaintiff railroad's complaint. The Court then called upon defendant union and gave it an opportunity to present evidence. The defendant union likewise stated that it had no evidence to present but chose to rely upon the record of the evidence produced prior to December 11, 1969. The Court then considered the record of the testimony heard by it prior to December 11, 1969. Argument by both parties was heard by the Court.

85. The Court observed and now notes that the Supreme Court laid down no guidelines as to how this Court should proceed, but merely ordered a hearing as to whether there had been good faith bargaining. This Court considered, however, that the Supreme Court had impliedly ordered this Court to order good faith bargaining, if it found that such had not occurred, and that the Supreme Court did

not by implication order or suggest that if the Court found that there had not been good faith bargaining that this Court should grant a permanent injunction or order the National Mediation Board to resume mediation. The Court further concluded that the question of good faith bargaining was not before the Supreme Court but only the question as to whether plaintiff railroad had a right to raise the issue of good faith bargaining in the original hearing before this Court and to have a hearing thereon. On the other hand this Court was and is fully aware from the total record before it that neither of the parties at the time of the original hearing before this Court had bargained in good faith and that all of the issues between them had not been fully explored.

86. Accordingly, this Court, after considering all of the evidence and argument of counsel, did on August 13, 1971 enter a preliminary injunction herein restraining defendant union from calling a work stoppage or strike by employees of plaintiff railroad and ordering good faith bargaining to begin on or before September 9, 1971.

87. After a full hearing upon the bargaining between the parties as in the findings herein set forth, the Court finds that both parties have devoted much time and effort to reach an agreement and that both parties have done so in good faith. The Court finds that the plaintiff has made more concessions in the negotiations than the defendant. However, the Court does not find that to be the sole criterion of good faith bargaining. The Court cannot find that a party to a controversy is acting in bad faith on all occasions merely because it refuses to change its position, when its position may very well be 100 per cent correct in the beginning, which this Court does not find to be the case.

88. The Court finds that if good faith bargaining should be held to require each party to modify its position until

an agreement is reached, that in effect would abolish the right of either side to resort to self help. That would contravene and defeat the very statute involved herein and empower this Court to arbitrate the controversy. Only Congress has the jurisdiction to grant this Court such power.

89. The Court finds that the purpose of the mandate of the Supreme Court to this Court in the instant case was to hold hearings and ascertain that no hasty action was taken until the controversy had been fully and carefully considered and negotiated by the parties. That the Court has done and the parties have negotiated in good faith since September 9th, 1971, and this Court no longer has jurisdiction to restrain the defendant union from calling a strike except pending appeal from the Court's final decree herein.

Conclusions of Law

1. This action arises under Section Two (2) First of the Railway Labor Act (45 U.S.C. § 152 First), and the Court has jurisdiction of the action under 28 U.S.C. §§ 1331 and 1337.

2. Section Two (2) First of the Railway Labor Act (45 U.S.C. § 152 First) requires "all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce . . ."

3. This action arises out of and involves a labor dispute within the meaning of the Norris-LaGuardia Act, 29 U.S.C. Section 101, et seq.

4. Following remand by the Supreme Court, 91 S.Ct. 1731, 29 L.Ed.2d 187, this Court entered a Decree on August 13, 1971, D.C., 330 F.Supp. 646, and since the entry

of the Decree the union has fully complied with its duties under the Railway Labor Act; has demonstrated that it has negotiated in good faith and is, therefore, entitled to resort to self-help and to call a strike upon the giving of reasonable notice.

5. The union has complied with Section Two (2) First of the Railway Labor Act (45 U.S.C. § 152 First) in its negotiations and has satisfied this Court's Decree in the following specific respects:

(a) the union has negotiated with the carrier over the carrier's proposals to reduce the size of main line freight crews;

(b) the union has negotiated and has permitted its negotiators to engage in these negotiations with the carrier over the carrier's proposals to settle the crew consist dispute by providing additional compensation to certain employees working on crews of one conductor and one brakeman;

(c) the union has negotiated on a crew by crew basis and has not insisted, or requested, that the carrier conform to any agreement or agreements made on other railroads but has insisted that the agreement conform generally to the union's agreements with other railroads were there existing conditions similar to those existing on plaintiff railroad;

(d) it did not constitute bad faith bargaining for the defendant union to refuse to enter into any agreement with plaintiff railroad which did not contain provisions generally similar to those of all other railroads with defendant union concerning crew consist, even if the union did not materially modify its original demand for such agreement.

6. The railroad failed to comply with its duty under Section Two (2) First of the Railway Labor Act since the inception of the crew consist dispute in 1965. It's refusal

to meet or negotiate on the ground that the union's notice was premature was condemned by the Court of Appeals which also squarely held that such conduct violated Section 8 of the Norris-LaGuardia Act. BRT v. Akron & Barberton Belt R. Co., D. of Col., 385 F.2d 581 (1967). Plaintiff railroad's conduct since the refusal to bargain has now been such as to purge it of its refusal to negotiate within the meaning of Section 8 of the Norris-LaGuardia Act.

7. The conduct of the defendant union in its negotiations on the crew consist issue since September 9, 1971 has been one of seeking to voluntarily resolve the issues by agreement, even though it has not changed its demands materially. The conduct of the plaintiff railroad in its negotiations with the defendant union during the period since September 9, 1971 has been in good faith, even though it has not been willing to enter into an agreement similar to that which the union has reached with all other railroads.

8. The defendant union having demonstrated its good faith and its compliance with the Decree of this Court, the clean hands doctrine of Section 8 of the Norris-LaGuardia Act is once again applicable.

9. The plaintiff railroad cannot be charged with bargaining in bad faith solely because it refuses to enter into an agreement with defendant union generally similar to the union's agreement with all other railroads if the railroad in good faith believes that such an agreement is not fair to it under all of the facts and circumstances, as the plaintiff railroad maintains there exists in the instant case.

10. The Court has no statutory authority to remand the controversy to the Mediation Board. That would be a useless gesture, for the Mediation Board has no statutory authority to order good faith bargaining or to determine whether either or both parties have bargained in good faith pursuant to Section Two (2) First of the Railway Labor Act. Only this Court has such authority.

11. No act of Congress has authorized this Court to mediate or arbitrate a controversy between a railroad and its employees acting through a union or otherwise. Neither did the Supreme Court in its mandate authorize or empower this Court to so act.

12. The requirements of the Railway Labor Act having been exhausted for more than thirty days with respect to the dispute between plaintiff and defendant arising from the notices served by defendant on plaintiff in July 1965 and by plaintiff on defendant in December 1965 with respect to the number and craft of persons to be employed by plaintiff in its train and yard crews, the Court does not have jurisdiction under the provisions of Sections 4 and 7 of the Norris-LaGuardia Act, 29 U.S.C. §§104, 107, to continue in force an injunction, either temporary or permanent against the defendant union striking and picketing plaintiff railroad as sought by plaintiff herein, except pending appeal.

13. The Court had jurisdiction herein on August 13, 1971, and it properly entered a Decree granting the plaintiff railroad a preliminary injunction restraining the defendant union from calling a strike by its members against their employer, the plaintiff railroad.

14. The Court concludes that each of the parties are at fault for the prolonged litigation prior to August 13, 1971 and that each should bear its own costs herein to this date.

15. Plaintiff railroad's complaint and its request for a permanent injunction should be denied; defendant union's motion to dismiss plaintiff's complaint should be allowed, and an appropriate decree should be entered for such purposes.

Decree

This cause came on for a further hearing after remand by the Supreme Court of the United States and, in ac-

cordance with this Court's Decree of August 13, 1971, and the Court having heard evidence on November 18 and 19, 1971, and having heard oral arguments by counsel for both parties on those dates and having examined the proposed findings of fact and conclusions of law submitted by each party, and having this day made the foregoing Findings of Fact and Conclusions of Law, the Court in accordance therewith enters the following Decree:

It is ordered, adjudged and decreed that:

1. The defendant union in its negotiations with the plaintiff carrier respecting the so-called crew consist dispute arising out of the defendant's notices of July 1965 and the plaintiff's notices of December 1965 has, pursuant to this Court's Decree of August 13, 1971, complied with the requirements of Section 2 First of the Railway Labor Act (45 U.S.C. Section 152 First).

2. The plaintiff railroad has likewise bargained in good faith since September 9, 1971 and has made numerous offers to the union, in each instance inducing its demands, as set forth in the Court's Findings of Fact entered herein.

3. The union having complied with the Railway Labor Act and with the August 13, 1971 Decree of this Court (made pursuant to the opinion and mandate of the Supreme Court of the United States), now from this day forward the Norris-LaGuardia Act (29 U.S.C. 101 et seq.) is applicable herein. The Court is therefore divested of jurisdiction to issue a permanent injunction restraining the exercise of self-help by the union with respect to the crew consist dispute. Plaintiff's motion for a permanent injunction is denied.

4. The defendant union is now free to resort to self-help and to call a strike of its members against their employer, the plaintiff railroad. The Court hereby vacates its Order of Injunction upon condition that the union may not ex-

ercise its right to strike until it has served 14 days notice upon plaintiff railroad.

5. This court no longer having jurisdiction to grant further relief to plaintiff railroad, now, therefore, the defendant's Motion to Dismiss the Complaint is allowed and the Complaint herein is dismissed for want of jurisdiction.

6. Each party shall pay its own costs herein.

APPENDIX E

United States District Court
Northern District of Illinois
Eastern Division

No. 69 C 2401

Chicago & North Western Railway Company, a Corporation,

Plaintiff,

vs.

United Transportation Union, a Voluntary Association,

Defendant.

August 13, 1971
(330 F.Supp. 646)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Perry, District Judge.

This cause comes on for final judgment; and the Court, having heard the evidence and considered the briefs and arguments of counsel, hereby makes its findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff Chicago and North Western Railway Company is a corporation engaged in the transportation by rail of passengers and freight in interstate commerce and a "carrier" within the meaning of Section One (1) of the Railway Labor Act (45 U.S.C. § 151).

2. The defendant United Transportation Union is a voluntary unincorporated labor organization which is the successor to the former Brotherhood of Railroad Trainmen and other labor unions, and represents under the Railway Labor Act (45 U.S.C. § 151 et seq.) certain employees of the carrier in road and yard service. The acts attributed herein to the union include acts of the former Brotherhood of Railroad Trainmen. (Complaint p. 2; Answer p. 2).

3. As a result of the Award of Arbitration Board No. 282, which board was established pursuant to Public Law 88-108 (77 Stat. 132 (1963)), the carrier was in 1965 required to operate substantially all its mainline freight crews with a minimum crew consist of one conductor and two brakemen, but was permitted to operate most of its other road and yard crews with a minimum crew consist of one conductor and one brakeman, subject to certain requirements of providing sufficient work for specified existing employees represented by the union. (PX 1; J. R. Wolfe Aff. pp. 5-11).

4. In July 1965 the union served upon the carrier under Section 6 of the Railway Labor Act (45 U.S.C. § 156) notices of proposed changes in the parties' collective bargaining agreements effective January 26, 1966 which would require a minimum crew consist of one conductor and two brakemen on all the carriers' crews in road and yard service. These crew consist notices were substantially identical to notices served by the union at various

times in 1965 and 1966 upon most of the other railroads in the United States. (PX 9, 10; Tr. 89, 226-227).

5. The carrier took the position that the foregoing notices of the union were premature because they were served during the period of the Award of Arbitration Board No. 282, and for this reason the carrier declined to meet with the union in conference to discuss these notices (Tr. 230; J. R. Wolfe Aff. p. 11). Thereafter, on October 4, 1965, these notices were docketed for mediation by the National Mediation Board (J. R. Wolfe Aff. p. 12), but no mediator was assigned to the dispute until May 15, 1969 (Tr. 272; J. R. Wolfe Aff. p. 30).

6. In Brotherhood of R. R. Trainmen v. Akron & Barberton B. R. R., 128 U.S. App.D.C. 59, 385 F.2d 581, 596-598, 613-614 (1967), the Court of Appeals for the District of Columbia Circuit held that the carrier breached its duty to bargain under the Railway Labor Act by refusing to discuss the union's notices in conference in 1965.

7. On December 24, 1965 the carrier served upon the union notices under Section 6 of the Railway Labor Act which proposed that the parties adopt a rule permitting the carrier to determine the size of all its crews unilaterally. Such a rule would permit the carrier to reduce the minimum size of mainline freight crews and certain other crews from two brakemen to one and permit the carrier to maintain the minimum size of other crews at a conductor and one brakeman. The carrier's crew consist notices were substantially identical to notices served by most of the other railroads in the United States at various times in 1965 and 1966 upon the union. The carrier's notices also requested that the parties meet in conference to discuss all their notices. (PX 12; J. E. Wolfe Aff. p. 19; Tr. 90, 102, 229).

8. The parties met in conference on January 18, 1966 at which time the carrier's notices were discussed, but the

union declined to discuss its notices concurrently with those of the carrier (Tr. 231, 385, 403-4; J. R. Wolfe Aff. pp. 13-14).

9. At the time of the service of its notices in December of 1965 the carrier took the position that if the parties were unable to resolve the crew consist dispute in conference, the dispute should thereafter be negotiated together with the crew consist disputes then pending between the union and most of the other railroads in the United States in what is commonly called "national handling" in the railroad industry. The union, however, has consistently refused to engage in national handling of this dispute, and instead has insisted upon negotiations with individual railroads. (PX 12; J. E. Wolfe Aff. pp. 19, 38; J. R. Wolfe Aff. pp. 13-14).

10. In the fall of 1966 the National Mediation Board terminated its mediatory services under Section 5 of the Railway Labor Act (45 U.S.C. § 155) with respect to the crew consist dispute between the union and three other railroads. These railroads then commenced an action in the United States District Court for the District of Columbia to litigate the question of whether or not the union could be required to negotiate the crew consist dispute in national handling. Atlantic C. L. R. R. v. Brotherhood of R. R. Trainmen, Civil Action No. 2908-66. In the District Court the union took the position, and its officers testified, that varying local conditions on each railroad made it necessary that the matter of crew consist be negotiated locally on each railroad, so that a local crew consist rule suitable to particular conditions on each railroad could be established (J. E. Wolfe Aff. pp. 55-61). The District Court ruled in favor of the railroads, holding that national handling of the crew consist dispute was required. 262 F.Supp. 177 (D.D.C.1967). The Court of Appeals for the District of Columbia Circuit reversed, holding that differing local conditions on each railroad made

a national crew consist rule "wholly unrealistic." 127 U.S.App.D.C. 298, 383 F.2d 225, 229 (1967). The Supreme Court denied *certiorari* in January of 1968 (389 U.S. 1047, 88 S.Ct. 790, 19 L.Ed.2d 839).

11. In March of 1968 the carrier invited the union to discuss as a means of compromising the dispute an agreement that would involve the payment of additional compensation to certain employees of the carrier's crews who were represented by the union—those employees who would work upon a crew having one, rather than two, brakemen. The union refused to enter into negotiations with respect to this proposal. The union's negotiators were barred by the union's national convention from making any agreement on crew consist such as the foregoing one proposed by the carrier. (PX 13-14; J. R. Wolfe Aff. pp. 15-17; Tr. 235-6, 408).

12. The parties held conferences at which defendant's crew consist notices were discussed in March, May, June, July, and August of 1968 (J. R. Wolfe Aff. pp. 17-21; Tr. 239-48). These meetings were recessed subject to the call of the union for further meetings (Tr. 254; J. R. Wolfe Aff. p. 21). The parties agreed in October of 1968 and in January of 1969 to defer further meetings to discuss the Union's notices (J. R. Wolfe Aff. p. 21).

13. The parties resumed conferences in April of 1969, and the union's notices were discussed in conferences during April and May of 1969 (Tr. 255-71; J. R. Wolfe Aff. pp. 21-31). These notices were also discussed by the parties at mediation sessions held under the auspices of the National Mediation Board in June and July of 1969 (Tr. 272-309; J. R. Wolfe Aff. pp. 32-37).

14. Throughout the foregoing conferences and mediation sessions the union at all times took the position that it would not negotiate with the carrier upon the latter's proposals for reductions in the size of mainline freight

crews from two brakemen to one. The union asserted that its position was based upon the fact that the other railroads which had settled the crew consist dispute with the union had not obtained any reductions in the size of mainline freight crews. As a result of the union's position the parties did not negotiate on the subject of the carrier's proposals to reduce the size of mainline freight crews (J. R. Wolfe Aff. pp. 23-24, 35-36, 37; Tr. 259-60, 267, 320-30).

15. "[A]t all times the defendant has taken the position that the only agreement that could be reached was and is that reached by nearly all of the railroads in the United States with defendant, which requires a restoration of approximately 95% of all of the jobs in question," that is, a minimum crew consist of one conductor and two brakemen on approximately 95% of all crews (Finding No. 14 of the Court's Order of December 11, 1969; See also J. R. Wolfe Aff. pp. 19-36; Tr. 243-315, 345, 371-372).

16. The union did not at any time in the parties' conferences in 1968 and 1969 contend that full-fledged bargaining had been impaired by the carrier's refusal to discuss the union's notices in the summer of 1965 (Tr. 315).

17. On October 16, 1969 the National Mediation Board terminated its services in the dispute over the parties' crew consist notices, and the President has not appointed an Emergency Board to investigate the dispute over these notices (J. R. Wolfe Aff. p. 37; Tr. 312).

18. On November 19, 1969 the carrier commenced this action for declaratory and injunctive relief upon the ground that the union by its bargaining conduct had violated Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) and that consequently the union had not exhausted the required procedures of the Railway Labor Act with respect to the dispute over the parties notices (Complaint pp. 4-5). A decision of this Court of December 11,

1969 dismissing the complaint for lack of jurisdiction was affirmed by the Court of Appeals for the Seventh Circuit on March 6, 1970, Chicago & North Western Ry. Co. v. United Transportation Union, 422 F.2d 979, but reversed by the Supreme Court on June 1, 1971, 402 U.S. 570, 91 S.Ct. 1731, 29 L.Ed.2d 187.

19. During the pendency of this action since November 19, 1969, there has been no bargaining or attempt to negotiate between the parties even though the parties have had full knowledge since June 4, 1971, that the Supreme Court had decided that pursuant to Section Two (2) First of the Railway Labor Act there must be bona fide bargaining and negotiation by the parties as a pre-requisite or condition precedent to the use of self-help in the form of a strike or lock out.

20. The Supreme Court, having in mind the over-riding public interest in a controversy between a railway and its employees, by its decision in which this cause was remanded to this Court, has now imposed upon the District Courts the duty of holding a hearing and taking evidence to determine whether there has been good faith bargaining by either or both of the parties. Once the issue of good faith bargaining has been raised, the Supreme Court has in the said decision specifically directed that the District Court hold such hearings, take evidence, and make a determination on the question of good faith bargaining, pursuant to Section Two (2) First of the Railway Labor Act, upon the charge by either party that said Section Two (2) First of the Railway Labor Act has not been faithfully carried out. The Supreme Court has implicitly empowered the District Courts to hold such a hearing if the public welfare requires it, even on the Court's own motion. The requirement for good faith bargaining is a dual obligation. A railroad cannot seek equitable relief on its own behalf without doing equity, but the Court can

order equitable relief, and order that matters remain status quo for the public welfare until there has been good faith bargaining.

21. At the present time the Court finds that neither of the parties herein has bargained in good faith, and therefore finds no difference in the lack of genuine bargaining on the part of either party. This Court simply finds that under the recent decision of the Supreme Court, where this cause was remanded to this Court, that the Supreme Court has held that the public welfare requires that this Court order the parties to proceed to negotiate and engage in conferences in a genuine effort to settle the issues herein. The Court further finds that until such time as the parties do engage in good faith bargaining pursuant to the provisions of Section Two (2) First of the Railway Labor Act this Court should grant an injunction restraining the use of self-help by either of the parties until the defendant has shown that it is bargaining in good faith and has made every reasonable effort to settle with the plaintiff.

22. The Court also finds that the plaintiff cannot refuse to engage in genuine bargaining and thereby defeat the right of the defendant to resort to self-help.

23. Unless enjoined by this Court the union will strike the carrier to compel it to accede to the union's crew consist demands. The effect of such a strike would be to bring about a virtual halt to the carrier's operations and to cause grave and irreparable harm to the carrier and to the public.

Conclusions of Law

1. This action arises under Section Two (2) First of the Railway Labor Act (45 U.S.C. § 152 First), and the Court has jurisdiction of the action under 28 U.S.C. §§ 1331 and 1337.

2. Section Two (2) First of the Railway Labor Act (45 U.S.C. § 152 First) requires both the carrier and the union

to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes * * * in order to avoid any interruption to commerce. * * *"

3. The union in the negotiations with the carrier over the parties' crew consist notices has violated Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) in the following respects:

(a) The union has refused to enter into negotiations with the carrier over the carrier's proposals to reduce the size of mainline freight crews;

(b) The union has refused to permit its negotiators to engage in negotiations with the carrier over the carrier's proposals to settle the crew consist dispute by providing additional compensation to certain employees working on crews of one conductor and one brakeman; and

(c) Although the union successfully argued to the federal courts of the District of Columbia that local negotiations upon local considerations were essential and made a national crew consist rule "wholly unrealistic", Brotherhood of R. R. Trainmen v. Atlantic C. L. R. R., 127 U.S. App.D.C. 298, 383 F.2d 225, 229 (1967), the union has nevertheless, by engaging in "take-it-or-leave-it" bargaining, at all times insisted that the only crew consist agreement that could be reached with this carrier is that reached by nearly all the other railroads in the United States with the union.

4. The union has not exhausted all the required major disputes procedures of the Railway Labor Act and will not be free to resort to self-help to influence the carrier to accede to the union's crew consist demands unless and until the union has negotiated with the carrier in compliance with Section 2 First of the Act.

5. Since the union's failure to engage in the negotiations required by Section 2 First of the Act occurred during the

period during which the National Mediation Board was attempting to comply with its statutory obligation to bring about a peaceful settlement (45 U.S.C. § 155), there has not been as to this dispute the sort of mediation contemplated by the Act.

6. Since the union's failure to engage in the negotiations required by Section 2 First of the Act continued throughout the *status quo* period prescribed by Section 5 of the Act (45 U.S.C. § 155) after the National Mediation Board surrendered its jurisdiction, there has not been as to this dispute the sort of negotiations contemplated by the Act during that *status quo* period.

7. Therefore, the union has not exhausted the required major disputes procedures of the Railway Labor Act and will not be free to resort to self-help with respect to this dispute until it has negotiated with the carrier in the fashion prescribed by Section 2 First of the Act both during mediation sessions conducted under the auspices of the National Mediation Board and for such further *status quo* periods as are provided by Sections 5 and 10 of the Act (45 U.S.C. §§ 155, 160).

8. An injunction against any strike by the union over the crew consist dispute with the carrier should issue as the only practical, effective means of enforcing the duty to exert every reasonable effort to make and maintain agreements. Such an injunction is not barred by Sections 4 or 8 of the Norris-LaGuardia Act (29 U.S.C. §§ 104, 108).

9. Such injunction should issue until further order of the Court in order to give the defendant union an opportunity to negotiate and bargain in good faith.

10. The Court has no statutory authority to remand the controversy to the Mediation Board. That would be a useless gesture, for the Mediation Board has no statutory authority to order good faith bargaining or to determine

whether either or both parties have bargained in good faith pursuant to Section Two (2) First of the Railway Labor Act. Only this Court has such authority.

11. The parties are duty bound and required as a condition precedent to negotiate and bargain in good faith with each other in order to reach an agreement and a settlement of the controversy over crew consist both before and after the controversy has been submitted for mediation and to continue to do so after mediation services have been terminated. Since the Court has found that neither of the parties have done so up until this time, then neither may resort to self-help until that is done.

12. Inasmuch as the parties have not bargained and negotiated as required by the Supreme Court in its opinion in this case, this Court has the authority to and it is duty bound, because of certain irreparable damage to the public, to grant an injunction against a strike by the defendant union, even though the plaintiff does not come into the Court with clean hands.

13. The clean hands equity doctrine would apply here except for the grave and irreparable damages that the public, composed of innocent bystanders, would suffer.

14. The Court has jurisdiction and it is the Court's duty to order and direct the parties herein to negotiate and engage in collective bargaining conferences in an attempt to reach an agreement concerning the controversy in question.

15. When and if the defendant shows good faith in negotiation and bargaining, whether the plaintiff does so or not, this Court will be by law required to vacate any order of injunction and permit the defendant to resort to self-help, that is to peacefully withdraw its members from employment by the plaintiff, or in more prosaic language to strike against the plaintiff. This, however, should not be done until notice has been given to the plaintiff and to the

public. It will be the duty of this Court to fix a proper period of notice to be given to the plaintiff and to the public in the event of the vacating of the Court's order granting an injunction against a strike.

Decree

This cause comes on upon remand from the Supreme Court of the United States and the Court having now carried out said mandate and having this day made findings of fact and conclusions of law herein does simultaneously herewith enter its decree in the following manner.

It is, therefore, ordered, adjudged, and decreed that:

1. The defendant union, throughout its negotiations with the plaintiff carrier respecting the so-called crew consist dispute arising out of the defendant's notices of July, 1965 and the plaintiff's notices of December, 1965, did not comply with the requirements of Section Two (2) First of the Railway Labor Act (45 U.S.C. § 152 First).

2. Because of this breach by the defendant union of its obligations under Section Two (2) First of the Railway Labor Act, there has not been the type of mediation required by Section Five (5) of the Railway Labor Act (45 U.S.C. § 155) nor the type of good faith negotiations required by Section Two (2) First during the status quo period prescribed by Section Five (5) following the termination of mediation.

3. The defendant union is, therefore, not free to exercise self-help with respect to the dispute arising out of the parties notices until the procedures required by Section Two (2) First of the Railway Labor Act have been carried out.

4. Until this Court has held a hearing and has found that the procedures required by Section Two (2) First of the Railway Labor Act have been carried out, the defend-

ant union, its divisions, locals, officers, agents, employees, members, and all persons acting in concert with them, are hereby enjoined from authorizing or engaging in any strike against or picketing of the plaintiff carrier in connection with the aforesaid crew consist dispute.

5. The parties hereto shall forthwith begin negotiating and bargaining conferences in an attempt to reach an agreement over the crew consist controversy that exists between them.

6. Hearing on whether the parties or either of them have complied with the provisions of Section Two (2) First of the Railway Labor Act is hereby set for September 24, 1971 at 2 P.M.

7. The matter of costs is reserved for later determination.

APPENDIX F

Supreme Court of the United States

No. 189, October Term 1970

Chicago & North Western Railway Co.,

Petitioner,

v.

United Transportation Union,

Respondent.

OPINION

June 1, 1971
(402 U.S. 570)

Mr. Justice Harlan delivered the opinion of the Court.

The Chicago and North Western Railway Co., petitioner in this action, brought suit in the United States

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District Court for the Northern District of Illinois to enjoin a threatened strike by the respondent, the United Transportation Union. The substance of the complaint was that in the negotiations between the parties over work rules, the Union had failed to perform its obligation under § 2 First of the Railway Labor Act, as amended, 44 Stat. 577, 45 U.S.C. § 152 First, "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions."[1] Jurisdiction was said to rest on 28 U. S. C. §§ 1331 and 1337. The Union in its answer contended that §§ 4, 7, and 8 of the Norris-LaGuardia Act, 47 Stat. 70, 71, 72, 29 U. S. C. §§ 104, 107, 108,[2] deprived the District Court of jurisdiction to issue a strike injunction and that in any event the complaint failed to state a claim upon which relief could be granted.[3] The District Judge, having heard evidence and argument, declined to pass on whether either party

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[1] The subsection provides:

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

[2] Section 4 reads in relevant part:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment. . . ." 29 U. S. C. § 104.

Section 7 imposes strict procedural requirements on the issuance of injunctions in labor disputes. Section 8 is set out in n. 12, *infra*.

[3] The Union also averred that it had complied with the command of § 2 First and that the Railroad had been derelict in its duty under that section.

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had violated § 2 First. In an unreported opinion, he concluded that the question was a matter for administrative determination by the National Mediation Board and was nonjusticiable; he further ruled that §§ 4 and 7 of the Norris-LaGuardia Act deprived the court of jurisdiction to issue an injunction against the Union's threatened strike. The Court of Appeals for the Seventh Circuit affirmed, 422 F. 2d 979, construing § 2 First as a statement of the purpose and policy of the subsequent provisions of the Act, and not as a specific requirement anticipating judicial enforcement. Rather, in that court's view, the enforcement of § 2 First was solely a matter for the National Mediation Board. *Id.*, at 985-988. We granted certiorari to consider this important question under the Railway Labor Act, on which the lower courts had expressed divergent views.[4] For reasons that follow we reverse.

I

For at least the past decade, the Nation's railroads and the respondent Union or its predecessors have been engaged in an off-and-on struggle over the number of brakemen to be employed on each train. We find it unnecessary to describe this history in any great detail, either generally or with particular reference to petitioner. Accounts at earlier stages may be found in *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co.*, 372 U. S. 284, 285-288 (1963). *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Burlington & Quincy R. Co.*, 225 F. Supp. 11, 14-17 (DC), aff'd, 118 U. S. App. D. C. 100, 331 F. 2d 1020 (1964); *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, 128 U. S. App.

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[4] See, besides the opinion below, *Piedmont Aviation, Inc. v. Air Line Pilots Assn.*, 416 F. 2d 633 (CA4 1969); *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, 128 U. S. App. D. C. 59, 385 F. 2d 581 (1967); aff'g 253 F. Supp. 538 (1966); *Seaboard World Airlines, Inc. v. Transport Workers*, 425 F. 2d 1086 (CA2 1970); *United Industrial Workers v. Galveston Wharves*, 400 F. 2d 320 (CA5 1968).

D. C. 59, 66-70, 385 F. 2d 581, 588-592 (1967); *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co.*, 127 U. S. App. D. C. 298, 383 F. 2d 225 (1967); and see the opinion of the court below, 422 F. 2d at 980-982, and n. 4. For present purposes it is sufficient to observe that the parties have exhausted the formal procedures of the Railway Labor Act: notices, conferences, unsuccessful mediation, refusal by the Union to accept the National Mediation Board's proffer of arbitration, termination of mediation, and expiration of the 30-day cooling-off period of § 5 First, 45 U. S. C. § 155 First. The Railroad's charge that the Union had violated § 2 First was based principally on its contention that the Union had consistently refused to handle the dispute on a nationwide basis while maintaining an adamant determination that no agreement should be reached with the Chicago & North Western more favorable to the carrier than agreements which the Union had already reached with other railroads. The complaint also alleged that the Union had refused to bargain on the proposals in the Railroad's counternotices.

The narrow questions presented to us are whether § 2 First imposes a legal obligation on carriers and employees or is a mere exhortation; whether the obligation is enforceable by the judiciary; and whether the Norris-LaGuardia Act strips the federal courts of jurisdiction to enforce the obligation by a strike injunction. The parties have not requested us to decide whether the allegations of the complaint or the evidence presented at the hearing was sufficient to show a violation of § 2 First, and the lower courts, by their resolution of the threshold questions, did not reach the issue. Accordingly, we intimate no view on this matter.

II

This Court has previously observed that "[t]he heart of the Railway Labor Act is the duty, imposed by § 2 First upon management and labor, 'to exert every reason-

able effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof'." *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369, 377-378 (1969). It is not surprising that such is the case. As one leading commentator has said, in connection with the duty under the National Labor Relations Act to bargain in good faith, "[i]t was not enough for the law to compel the parties to meet and treat without passing judgment upon the quality of the negotiations. The bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition." Cox, The Duty to Bargain in Good Faith, 71 Harv.L.Rev. 1401, 1412-1413 (1958). We recognized this to be true when we said in *NLRB v. Insurance Agents' International,* 361 U. S. 477, 484-485 (1960), that "the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union."

Virginian R. Co. v. System Federation No. 40, 300 U. S. 515 (1937), furnishes an early illustration of this principle in connection with the duty to "exert every reasonable effort" under the Railway Labor Act. In that case, the railroad refused to recognize a union certified by the National Mediation Board as the duly authorized representative of its shop workers, and instead sought to coerce these employees to join a company union. The employees sought and obtained an injunction requiring the railroad to perform its duty under § 2 Ninth to "treat with" their certified representative; the injunction also compelled the railroad "to exert every reasonable effort" to make and maintain agreements with the union. This Court affirmed that decree, explicitly rejecting the argument that the duty to exert every reasonable effort was

only a moral obligation. This conclusion has been repeatedly referred to without criticism in subsequent decisions.[5]

The conclusion that § 2 First is more than merely hortatory finds support in the legislative history of the Railway Labor Act as well. As this Court has often noted, the Railway Labor Act of 1926 was, and was acknowledged to be, an agreement worked out between management and labor, and ratified by the Congress and the President.[6] Accordingly, the statements of the spokesmen for the two parties made in the hearings on the proposed Act are entitled to great weight in the construction of the Act.[7]

In the House hearings, Donald R. Richberg, counsel for the organized railway employees supporting the bill, was unequivocal on whether § 2 First imposed a legal obligation on the parties. He stated, "it is [the parties'] duty to exert every reasonable effort . . . to settle all disputes, whether arising out of the abrogation of agreements or otherwise, in order to avoid any interruption to commerce. In other words, the legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court com-

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[5] *E. g., Elgin, J. & E. R. Co. v. Burley,* 325 U. S. 711, 721-722, n. 12 (1945), adhered to on rehearing, 327 U. S. 661 (1946); *Stark v. Wickard,* 321 U. S. 288, 306-307 (1944); *Order of Railroad Telegraphers v. Chicago & N. W. R. Co.,* 362 U. S. 330, 339 (1960); *International Association of Machinists v. Street,* 367 U. S. 740, 758 (1961); *Brotherhood of Railway Clerks v. Association for the Benefit of Non-Contract Employees,* 380 U. S. 650, 658 (1965); *Detroit & T. S. L. R. Co. v. United Transportation Union,* 396 U. S. 142, 149, 151 (1969).

[6] *E. g., International Association of Machinists v. Street,* 367 U. S. 740, 758 (1961).

[7] See, *e. g., Detroit & T. S. L. R. Co. v. United Transportation Union,* 396 U. S. 142, 151 n. 18, 152 n. 19, 153 n. 20 (1969).

pulsion."[8] Mr. Richberg went on to describe why the bill had been drafted in general language applicable equally to both parties, rather than in terms of specific requirements or prohibitions accompanied by explicit sanctions:

> "We believe, and this law has been written upon the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is more danger in attempting to write specific provisions and penalties into the law than there is in writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America."[9]

Accordingly, we think it plain that § 2 First was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis.

The Court of Appeals, in seemingly coming to the contrary conclusion, relied on this Court's decision in *General Committee of Adjustment v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323 (1943). In that case, the Court held that jurisdictional disputes between unions were not justiciable, but were left by the Act either to resolution by the National Mediation Board under § 2 Ninth or to the economic muscle of the parties. Reliance had been placed on § 2 Second, which requires that all disputes should be considered and if possible decided in conference of the authorized representatives of the parties. The Court

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[8] Hearings on Railroad Labor Disputes (H. R. 7180) before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess., 91 (1926). See also *id.*, at 40-41, 66, 84-85.

[9] *Id.*, at 91. See also *id.*, at 66.

held that this reliance was misplaced: "Nor does § 2, Second make justiciable what otherwise is not. . . . § 2, Second, like § 2, First, merely states the policy which those other provisions buttress with more particularized commands." *Id.*, at 334 (footnote omitted).

In light of the place of § 2 First in the scheme of the Railway Labor Act, the legislative history of that section, and the decisions interpreting it, the passing reference to it in the *M-K-T* case cannot bear the weight which the Court of Appeals sought to place upon it.

III

Given that § 2 First imposes a legal obligation on the parties, the question remains whether it is an obligation enforceable by the judiciary. We have often been confronted with similar questions in connection with other duties under the Railway Labor Act.[10] Our cases reveal that where the statutory language and legislative history are unclear, the propriety of judicial enforcement turns on the importance of the duty in the scheme of the Act, the capacity of the courts to enforce it effectively, and the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory.

We have already observed that the obligation under § 2 First is central to the effective working of the Railway Labor Act. The strictest compliance with the formal procedures of the Act is meaningless if one party goes through the motions with "a desire not to reach an agreement." *NLRB v. Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (CA1 1953). While cases in which the union

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[10] See, *e. g., Texas & N. O. R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548 (1930); *Virginian R. Co. v. System Federation No. 40*, 300 U. S. 515 (1937); *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768 (1952).

is the party with this attitude are perhaps rare, they are not unknown. See *Chicago Typographical Union No. 16*, 86 N. L. R. B. 1041 (1949), enforced *sub nom. American Newspaper Publishers Assn. v. NLRB*, 193 F. 2d 782 (CA7 1951), aff'd as to another issue, 345 U. S. 100 (1953). We think that at least to this extent the duty to exert every reasonable effort is of the essence.[11]

The capacity of the courts to enforce this duty was considered and affirmed in the *Virginian* case. Mr. Justice Stone, speaking for the Court, noted that "whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees." 300 U. S., at 550. Section 8 of the Norris-LaGuardia Act explicitly requires district courts to determine whether plaintiffs have "failed to make every reasonable effort" to settle the dispute out of which the request for the injunction grows.[12] We have no reason to believe that the district courts are less

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[11] While we have no occasion to determine whether § 2 First requires more of the parties than avoidance of "bad faith" as defined by Judge Magruder in *Reed & Prince, supra*, we note two caveats. First, parallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes. Cf. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369, 383 (1969). Second great circumspection should be used in going beyond cases involving "desire not to reach an agreement," for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements. See n. 19, *infra*.

[12] The section provides in full:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." 29 U.S.C. § 108.

capable of making the inquiry in the one situation than in the other.

Finally, we must consider the Court of Appeals' position that the question whether a party had exerted every reasonable effort was committed by the Railway Labor Act to the National Mediation Board rather than to the courts. We believe that the legislative history of the Railway Labor Act rather plainly disproves this contention. It is commonplace that the 1926 Railway Labor Act was enacted because of dissatisfaction with the 1920 Transportation Act, and particularly with the performance of the Railroad Labor Board. While there were many causes of this dissatisfaction, one of the most prominent was that because of its adjudicatory functions, the Board effectively lost any influence in attempting to settle disputes. Throughout the hearings on the bill which became the 1926 Act there are repeated expressions of concern that the National Mediation Board should retain no adjudicatory function, so that it might maintain the confidence of both parties.[13] And as the Court noted in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 303 (1943), when Congress in 1934

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[13] *E. g., Hearings, supra*, n. 8, at 18 (Mr. Richberg):

"The board of mediation, to preserve its ability to mediate year after year between the parties, must not be given any duties to make public reports condemning one party or the other, even though the board may think one party is wrong. That is the fundamental cause of failure of the [Railroad] Labor Board. That is the reason why the Labor Board machinery never would work, because a board was constituted to sit and deliver opinions which must be opinions for or against one party, and as soon as that board began delivering opinions publicly against a party, that party was sure the board was unfair to it. That is human nature. The board, in other words, was created in a manner to destroy any confidence in itself.

"The board of mediators is not for that function. The board of mediators should never make any reports to the public condemning one party or the other. Their duty is that of remaining persuaders."

gave the Board power to resolve certain jurisdictional disputes, it authorized the Board to appoint a committee of neutrals to decide the dispute "so that the Board's 'own usefulness of settling disputes that might arise thereafter might not be impaired.' S. Rep. No. 1065, 73d Cong., 2d Sess., p. 3." Only last Term we referred to the fact that "the Mediation Board has no adjudicatory authority with regard to major disputes." *Detroit & T. S. L. R. Co. v. United Transportation Union*, 396 U. S. 142, 158 (1969). In light of these considerations, we think the conclusion inescapable that Congress intended the enforcement of § 2 First to be overseen by appropriate judicial means rather than by the Mediation Board's retaining jurisdiction over the dispute or prematurely releasing the parties for resort to self-help if it feels such action called for.[14]

IV

We turn finally to the question whether § 4 of the Norris-LaGuardia Act[15] prohibits the use of a strike injunction in all cases of violation of § 2 First. The fundamental principles in this area were epitomized in *International Association of Machinists v. Street*, 367 U. S. 740, 772-773 (1961):

> "The Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101-115, expresses a basic policy against the injunction of activities of labor unions. We have held

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[14] If such were the exclusive remedy for violations of § 2 First, not only would it endanger the effectiveness of the Board's mediatory role and risk premature interruptions of transportation, but it would provide no remedy for cases where the violations of § 2 First occurred or first became apparent after the Board had certified that its mediatory efforts had failed.

[15] See n. 2, *supra*, for the text.

that the Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act. *Virginian R. Co. v. System Federation*, 300 U. S. 515; *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232. However, the policy of the Act suggests that the courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right."

Similar statements may be found in many of our opinions.[16] We consider that these statements properly accommodate the conflicting policies of our labor laws, and we adhere to them. We find it quite impossible to say that no set of circumstances could arise where a strike injunction is the only practical, effective means of enforcing the command of § 2 First. Accordingly, our prior decisions lead us to hold that the Norris-LaGuardia Act did not forbid the District Court from even considering whether this is such a case.[17] If we have misinterpreted the congressional purpose, Congress can remedy the situation by speaking more clearly. In the meantime we have no choice but to trace out as best we may the uncertain

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[16] See *Virginian R. Co. v. System Federation No. 40*, 300 U. S. at 562-563; *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232, 237 (1949); *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768, 774 (1952); *Brotherhood of Railroad Trainmen v. Chicago R. & I. R. Co.*, 353 U. S. 30, 41-42 (1957); cf. *Order of Railroad Telegraphers v. Chicago & N. W. R. Co.*, 362 U. S., at 338-339; *id.*, at 360-364 (dissenting opinion); *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 458 (1957).

[17] The congressional debates over the Norris-LaGuardia Act support a construction of that Act permitting federal courts to enjoin strikes in violation of the Railway Labor Act in appropriate cases. See 75 Cong. Rec. 4937-4938 (Sen. Blaine); *id.*, at 5499, 5504 (Rep. LaGuardia).

line of appropriate accommodation of two statutes with purposes that lead in opposing directions.[18]

We recognize, of course, that our holding that strike injunctions may issue when such a remedy is the only practical, effective means of enforcing the duty to exert every reasonable effort to make and maintain agreements falls far short of that definiteness and clarity which businessmen and labor leaders undoubtedly desire. It creates a not insignificant danger that parties will structure their negotiating positions and tactics with an eye on the courts, rather than restricting their attention to the business at hand. Moreover, the party seeking to maintain the status quo may be less willing to compromise during the determinate processes of the Railway Labor Act if he believes that there is a chance of indefinitely postponing the other party's resort to self-help after those procedures have been exhausted. See *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U. S., at 380-381; cf. Hearings, *supra*, n. 8, at 17, 50, 100 (Mr. Richberg); *id.*, at 190 (Mr. Robertson). Finally, the vagueness of the obligation under § 2 First could provide a cover for freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place.[19]

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[18] Section 2 First was re-enacted in 1934, two years after the Norris-LaGuardia Act. Act of June 21, 1934, c. 691, 48 Stat. 1185. In the event of irreconcilable conflict between the policies of the earlier, general provisions of the Norris-LaGuardia Act and those of the subsequent, more specific provisions of § 2 First, the latter would prevail under familiar principles of statutory construction. *Virginian R. Co. v. System Federation No. 40*, 300 U. S., at 563.

[19] Section 8 (d) of the National Labor Relations Act, 29 U. S. C. § 158 (d), was added precisely because of congressional concern that the NLRB had intruded too deeply into the collective-bargain in good faith. See *NLRB v. American National Insurance Co.*, 343 U. S. 395 (1952); *NLRB v. Insurance Agents' International*, 361 U. S. 477 (1960).

These weighty considerations indeed counsel restraint in the issuance of strike injunctions based on violations of § 2 First. See n. 11, *supra*. Nevertheless, the result reached today is unavoidable if we are to give effect to all our labor laws—enacted as they were by Congresses of differing political makeup and differing views on labor relations—rather than restrict our examination to those pieces of legislation which are in accord with our personal views of sound labor policy. See *Boys Markets v. Retail Clerks Local 770*, 398 U. S. 235, 250 (1970).

V

As we noted at the outset, we have not been requested to rule on whether the record shows a violation of § 2 First in circumstances justifying a strike injunction, and we do not do so. Such a question should be examined by this Court, if at all, only after the facts have been marshaled and the issues clarified through the decisions of lower courts.

In view of the uncertainty heretofore existing on what constituted a violation of § 2 First and what showing was necessary to make out a case for a strike injunction, we believe the appropriate course is to remand the case to the Court of Appeals with instructions to return the case to the District Court for the taking of such further evidence as the parties may deem necessary and that court may find helpful in passing on the issues which the case presents in light of our opinion today.

Reversed and remanded

Mr. Justice Brennan, with whom Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice White join, dissenting.

The instant dispute between the Chicago & North Western Railway Company (Railway) and the United Trans-

portation Union (Union) reaches back to the decision of Arbitration Board No. 282, established pursuant to 77 Stat. 132 (1963). That board was established by Congress, after the failure of the dispute-settlement machinery of the Railway Labor Act, to arbitrate disputes between various carrier and unions over the number of brakemen required on trains and the necessity of firemen on diesel locomotives. Insofar as is here pertinent, Board 282's award ultimately led to elimination of approximately 8,000 brakemen's jobs across the Nation. By its terms, however, the award expired January 25, 1966. Prior to expiration, the Union served upon the Railway notices under § 6 of the Railway Labor Act, 45 U. S. C. § 156,[1] which called for re-establishing many of the brakemen's positions eliminated by Board 282 by changing the existing agreements to require not less than two brakemen on every freight and yard crew. The Railway reciprocated by serving upon the Union a § 6 notice requesting an agreement that would make crew size a matter of managerial judgment. The parties held conferences under § 6 without reaching agreement. The National Mediation Board attempted to mediate the dispute pursuant to § 5, 45 U. S. C. § 155,[2] failed, and proffered arbitration pursuant to the

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[1] Section 6 provides in part:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions . . . ."

[2] Section 5 First, provides in part:

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

* * * * * * * *

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use

same section. After the Union declined to accept arbitration, the National Mediation Board terminated its jurisdiction. Since no emergency board was appointed by the President under § 10, 45 U. S. C. § 160,[3] after the 30-day cooling-off period of § 5 had run,[4] the Act's prohibition against resort to self-help measures lapsed.

Thereafter, the Railway brought this action in Federal District Court seeking an injunction against a threatened strike, alleging that the Union had not lived up to its obligation under § 2 First, 45 U. S. C. § 152 First, to "exert every reasonable effort" to make and maintain working agreements. Specifically, the Railway alleged

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its best efforts, by mediation, to bring them to agreement. If such efforts . . . shall be unsuccessful, the said Board shall at once endeavor as its final required action . . . to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter."

[3] Section 10 provides in part:

"If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. . . .

* * * * * * *

"After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

[4] Section 5 First, provides in part:

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

that the Union had violated its statutory duty in the following ways:

> "First: Having insisted in the foregoing dispute upon bargaining separately with the plaintiff carrier instead of bargaining jointly with all the railroads upon which the BRT [Brotherhood of Railroad Trainmen] had served like notices, nevertheless
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> "(a) The defendant has refused to bargain on the proposals in the carrier's counter-notices to reduce the size of main line road crews;
>
> "(b) The defendant has insisted that any agreement on the C&NW be no more favorable to the C&NW than agreements reached on the other railroads upon which the BRT served like notices;
>
> "(c) The defendant has entered negotiations with a fixed position and a determination not to deviate from the position regardless of what relevant consideration might be advanced by the C&NW; and
>
> Second: Notwithstanding the foregoing, the defendant has refused to engage in national handling of this dispute and to negotiate on a joint basis a national crew consist agreement with all the railroads on which the BRT served like notices." App. 7.

The District Judge denied the injunction, holding that "[w]hether there has been compliance with Section 2 First . . . is a matter for administrative determination . . . is not justiciable and this Court does not have jurisdiction to consider or adjudicate disputes with respect to compliance with such subsection . . ." App. 204-205. The Court of Appeals affirmed, 422 F. 2d 979 (CA7 1970). We granted certiorari, 400 U. S. 818 (1970), to resolve a conflict in the circuits. *Piedmont Aviation, Inc. v. Air Line Pilots Assn.*, 416 F. 2d 633 (CA4 1969). I believe that the Railway Labor Act evidences a clear intention to

prohibit courts from weighing the relative merits of each party's attempts to reach a bargaining agreement, and that the decision of the Seventh Circuit should, therefore, be affirmed.

This case presents the question whether, in a major dispute, a District Court may enjoin self-help measures after the completion of the statutory procedures if it determines that a party has not made "every reasonable effort" to reach agreement as required by § 2 First. Underlying this question is the corollary one, to what extent a District Court may inquire into collective negotiations in determining whether a party has complied with its statutory duty.

In answering these questions particular attention must be paid to the legislative history of the Act. Railway labor dispute-settlement law has undergone a long legislative evolution which this Court has previously explored. *International Association of Machinists v. Street*, 367 U. S. 740, 750-760, and nn. 10-12 (1961); see also *Texas & N. O. R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548 (1930); *Virginian R. Co. v. System Federation No. 40*, 300 U. S. 515 (1937); *Union Pacific R. Co. v. Price*, 360 U. S. 601 (1959); *Detroit & T. S. L. R. Co. v. United Transportation Union*, 396 U. S. 142 (1969). Much of the experimentation prior to passage of the Railway Labor Act of 1926 proved unsuccessful. Recognition that growing unrest in the railway industry had created a situation with potentially grave public consequences, led the President, in three messages to Congress between 1923 and 1925, and both the Republican and Democratic Parties, in 1924, to call for unprecedented cooperation between carriers and unions. H. R. Rep. No. 328, 69th Cong., 1st Sess., 2-3 (1926); S. Rep. No. 606, 69th Cong., 1st Sess., 2-3 (1926); Hearings on Railroad Labor Disputes (H. R. 7180) before the House Committee on Interstate and Foreign Com-

merce, 69th Cong., 1st Sess., 21-22, 90, 98, 197 (1926) (hereinafter Hearings). These basically antagonistic forces were urged to sit down and develop a workable solution for settling disputes in their industry in order to minimize the rupture of the public services that they provided. The legislative product devised by the parties themselves, which Congress enacted in 1926 as the Railway Labor Act, 44 Stat. 577, was a unique blend of moral and legal duties looking toward settlement through conciliation, mediation, voluntary arbitration, presidential intervention, and finally, in case of ultimate failure of the statutory machinery, resort to traditional self-help measures. The cooperation involved was unparalleled in this country's labor history. It was felt significant to all involved that the parties themselves had worked out a solution and had presented it to Congress.[5] The significance lay in the fact that since the bill represented "the agreement of the parties . . . they will be under the moral obligation to see that their agreement accomplishes its purpose, and that if enacted into law they will desire to prove the law a success." Hearings 21.

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[5] "Mr. Richberg: . . . This bill which has been introduced in the House and in the Senate simultaneously represents the product of months of negotiations and conferences between the representatives of 20 railroad labor organizations and the Association of Railway Executives representatives, representing the great majority, practically all, of the carriers by railroad." Hearing 9.

"I want to emphasize again that this bill is the product of a negotiation between employers and employees which is unparalleled, I believe, in the history of American industrial relations.

"For the first time representatives of a great majority of all the employers and all the employees of one industry conferred for several months for the purpose of creating by agreement a machinery for the peaceful and prompt adjustment of both major and minor disagreements that might impair the efficiency of operations or interrupt the service they render to the community. They are now asking to have this agreement written into law, not for the purpose of having governmental power exerted to compel the parties to do right but in order to obtain Government aid in their cooperative efforts and in order to assure the public that their

The outstanding feature of the bill was that it was voluntary—Congress, the carriers, and the unions all recognized that there were very few enforceable provisions, and still fewer judicially enforceable ones.[6] In testimony before Congress, Mr. Richberg, the major spokesman for the unions, stated, "[O]ur thought has been in this law not to write a lot of statute law for the courts to enforce. . . . We expect that most of the provisions of this bill are to be enforced by the power of persuasion, either exercised by the parties themselves or by the Government board of mediation representing the public interest." Hearings 65-66. Congress recognized the absence of coercive measures but chose not to add them, noting that "it is in the public interest to permit a fair trial of the method of amicable adjustment agreed upon by the parties . . . ." S. Rep. No. 606, 69th Cong.,

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interest in efficient continuous transportation service will be permanently protected.

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"It is a remarkable fact that all parties concerned were able to lay aside the hostile feelings and suspicions that had too often characterized past negotiations and to act upon the belief that if an agreement were reached, it would be carried out in the same spirit of good faith and fair dealing that characterized the negotiations." Hearings 21-22.

[6] Mr. Thom (carrier representative). "I wish you to bear that fact in mind—the moral obligation now resting upon each one of the proponents of this bill in respect to its effect upon the public interest. Suppose it is changed in any important particular, what effect will that have upon the moral obligation to which I have just alluded? . . .

"I personally attach most substantial importance to the view I am now asking you to consider. I think that when a measure is adopted, backed by the moral obligation of the parties that it will not be permitted in any degree to [a]ffect adversely the public interests, it would be a most unwise thing to insert measures of coercion, substitute principles, or anything that would have the effect of liberating these parties from the position they have voluntarily assumed before you, that this is a workable measure." Hearings 115.

1st Sess., 4 (1926). Thus, the history of the Act reveals that in dealing with major disputes Congress was content to enact a machinery which dragged on, with cooling-off periods and various status quo restrictions, while the parties were required to "treat with" one another, § 2 Ninth, 45 U. S. C. § 152 Ninth, in the hope that ultimately they would voluntarily reach agreement.

In order to bring about settlement, it was made "the duty of all carriers . . . and employees to exert every reasonable effort to make and maintain agreements . . . in order to avoid any interruption to commerce . . . ." § 2 First, 45 U. S. C. § 152 First. From the outset, Congress was interested in the meaning of this provision and whether this statutory duty was viewed by the drafters to be a judicially enforceable one. During the hearings on the House bill the following colloquy occurred:

> "Mr. Huddleston. Now, referring to section 2 on page 3, ['] it shall be the duty of all carriers, their officers, agents, and employees, to exert every reasonable effort to make and maintain agreements,' etc. Do you agree that that also is unenforceable by judicial proceeding?
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> "Mr. Richberg. Not always. I think any action involving an arbitrary refusal to comply with that duty might be subject to judicial compulsion. I am sure it would work both ways.
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> . . . . .
>
> "In other words, I think it would not be exerting a reasonable effort to make and maintain agreements, for a carrier or its appropriate officers to refuse to even meet a committee that sought to make an agreement.
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> . . . . .

"Mr. Huddleston. You think, then, that this section is enforceable?

"Mr. Richberg: I think that a duty imposed by law is enforceable by judicial power, yes. Of course, this is not a duty which could be enforced in a very absolute way, because it is a duty to exert every reasonable effort. In other words, all that could be enforced by the court would be an order against an arbitrary refusal to even attempt to comply with that duty, but I believe that could be subject to judicial power." Hearings 84-85.

In response to an earlier question Mr. Richberg had testified:

". . . In the first place, I think if either party showed a willful disregard of the fundamental requirements, that they should make every reasonable effort to make an agreement—in other words, if they refuse absolutely to confer, to meet or discuss or negotiate, I think there is a question as to whether there might not be invoked some judicial compulsion, but I would rather see that left to development rather than see it written into the law. But outside of that, if the parties do not make an agreement, I think you face this question, first, as to whether the Government board of mediation could bring them to see the error of their ways; and, second, if that effort was unsuccessful, whether they could bring them to refer that dispute to an arbitration, and then if it was of sufficient magnitude so that it actually affected commerce substantially, whether the emergency board could not itself bring about an adjustment." Hearings 66.

Since the Act was the product of months of discussion between the carriers and unions and since Mr. Rich-

berg's testimony was uncontradicted by the representatives of the carriers,[7] it seems fair to say that the above testimony evidences an understanding on the part of the unions, carriers, and Congress that the duty "to exert every reasonable effort" was judicially enforceable at least to the extent of requiring the parties to sit down at the bargaining table and talk to each other. This is exactly what this Court held in *Virginian R. Co. v. System Federation No. 40*, 300 U. S. 515 (1937). That case was an equitable action brought by the Federation to force the Railway to bargain with it. The carrier, despite the Mediation Board's certification of the Federation as the bargaining agent of the employees, had continued to deal only with its company union. This Court held that the duty to exert every reasonable effort to reach agreement, which had been held to be without legal sanction in the context of the previous Act, *Pennsylvania R. Co. v. Labor Board*, 261 U.S. 72 (1923),

> "no longer stand[s] alone and unaided by mandatory provision . . . . The amendment of the Railway Labor Act added new provisions in § 2, Ninth, which makes it the duty of the Mediation Board, when any dispute arises among the carrier's employees, 'as to who are the representatives of such employees,' to investigate the dispute and to certify . . . the name of the organization authorized to represent the employees. It commands that 'Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act.'
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> "It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a

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[7] Carrier representatives were present throughout the congressional testimony of Mr. Richberg. None contradicted Mr. Richberg's viewpoint in their testimony.

proper case, be enforced by the courts." 300 U. S., at 544-545.

"[W]e cannot assume that its [§ 2 Ninth's] addition to the statute was purposeless .... The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First." *Id.*, at 547-548.

Virginian R. Co. stands, then, for the proposition that, once the Board has certified a union as the bargaining agent of the employees, a court may require the employer to "treat with" that representative in order that the statutory machinery of the Railway Labor Act be given a chance to bring about a voluntary settlement. It is, in essence, an order for the parties to recognize one another and *begin* the long, drawn-out statutory bargaining process.

In the years since *Virginian R. Co.* this Court, in the context of a major dispute, has authorized the issuance of an injunction in only two other carefully limited classes of railway litigation—that seeking to prevent invidious discrimination on the part of a union as against employees and that seeking to prevent violation of the Act's status quo provisions during bargaining. In a series of cases beginning with *Steele v. Louisville & N. R. Co.*, 323 U. S. 192 (1944),[8] this Court has held that "the language of

[8] See also *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944); *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232 (1949); *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768 (1952).

the Act to which we have referred [§§ 1 Sixth; 2 Second, Third, Fourth, and Ninth], read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." *Id.*, at 202-203. Recently, in *Detroit & T. S. L. R. Co. v. United States Transportation Union*, 396 U. S. 142 (1969), this Court held that the Act's status quo requirement, which "is central to its design," could be enforced by judicial authority. *Id.*, at 150. While in each of these instances the Court found specific, positive statutory mandates for judicial interference, the underlying cohesiveness of the decisions lies in the fact that in each instance the scheme of the Railway Labor Act could not begin to work without judicial involvement. That is, unless the unions fairly represented all of their employees; unless the employer bargained with the certified representative of the employees; unless the status quo was maintained during the entire range of bargaining, the statutory mechanism could not hope to induce a negotiated settlement. In each case the judicial involvement was minimal and in keeping with the central theme of the Act—to bring about voluntary settlement. In each case the "collective bargaining agents stepped outside their legal duties and violated the Act which called them into being . . ." *Order of Railroad Telegraphers v. Chicago & N. W. R. Co.*, 362 U. S. 330, 338 (1960).

In the instant case, we have an entirely different situation. Here, all parties were fairly represented, the status quo was being maintained, and, most important, each bargaining representative met and conferred with his counterpart. The step-by-step procedures prescribed by the Railway Labor Act had been carried through. In essence, the Court holds that a district court has the duty under

§ 2 First, to assess the bargaining tactics of each of the parties *after* the entire statutory scheme has run its course. If, then, the court determines that a party had not exerted sufficient effort to reach settlement, it should enjoin self-help measures, and, if such action is to make any sense within this statutory scheme, remand the parties to some unspecified point in the bargaining process. Such a notion is entirely contrary to the carefully constructed premise of the Railway Labor Act.

My summary of the legislative history of the Act clearly discloses that judicial involvement in the railway bargaining process was to be minuscule since the entire focus of the Act was toward achieving a voluntary settlement between the protagonists. "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them." *Terminal Assn. v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, 6 (1943) (footnote omitted). It is clear to me that the duty to exert every reasonable effort was agreed upon to make effective the duty of the carrier to recognize the union chosen by the employees—in other words, it is essentially a corollary of the duty. Such a duty does not contemplate that governmental power should, after failure of the parties to reach accord, be added to the scales in favor of either party and thus compel the other to agree upon the aided party's terms. Rather, at that point, impasse was to free both parties to resort to self-help. See *NLRB v. Insurance Agents' International*, 361 U. S. 477, 484-486 (1960). As Mr. Richberg had testified, "I wish to stress that one point above all others. We are seeking an opportunity to preserve self-government in industry. . . . We are not asking the Government to use force against one or the other party. We are simply asking aid and cooperation." Hearings 22.

Even apart from what the drafters of the Act representing both sides specifically contemplated, the result reached today will destroy entirely the carefully planned scheme of the Act. The Act is built upon a step-by-step framework. Each step is carefully drawn to introduce slightly different pressures upon the parties to reach settlement from the preceding step. First, the parties confer jointly. Next, the National Mediation Board may add its pressure through mediation. Then, the President may call into effect both the great power of his office and that of informed public opinion through the creation of an emergency board. Underlying the entire statutory framework is the pressure born of the knowledge that in the final instance traditional self-help economic pressure may be brought to bear if the statutory mechanism does not produce agreement. The Act does not evidence an intention to return to any step once completed. The Court's decision will effectively destroy the scheme of gradually escalating pressures. Moreover, the Court provides absolutely no guidance as to where in the bargaining scheme the parties are to be remanded. Does the court send them back to the Mediation Board which has already terminated jurisdiction finding the parties to have reached impasse? Should the court remand to some other phase of the proceedings? If so, where?

More important, however, is the mortal wound today's holding inflicts on the critical role to be played by the presence of economic weapons in reverse. *NLRB v. Insurance Agents' International, supra,* at 488-489. As the statutory machinery nears termination without achieving settlement, the threat of economic self-help and the pressures of informed public opinion create new impetus toward compromise and agreement. If self-help can now effectively be thwarted by injunction and by drawn-out court proceedings after the termination of the entire bar-

gaining process, or worse yet, at each step thereof, the threat of its use becomes impotent, indeed.

Since there is no specific mandate for an injunction in the circumstances presented by this case, the more general provisions of the Norris-LaGuardia Act are applicable. *Virginian R. Co. v. System Federation No. 40,* 300 U. S., at 563; *Brotherhood of Railroad Trainmen v. Chicago R. & I. R. Co.,* 353 U. S. 30, 40-41 (1957).

> "The Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101-115, expresses a basic policy against the injunction of activities of labor unions. We have held that the Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act. *Virginian R. Co. v System Federation,* 300 U. S. 515; *Graham v. Brotherhood of Locomotive Firemen & Enginemen,* 338 U. S. 232. However, the policy of the Act suggests that the courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right." *International Association of Machinists v. Street,* 367 U. S., at 772-773.

My conclusion, then, is that the Railway Labor Act as designed by its coframers and as enforced by this Court excludes any role for the judiciary to oversee the relative efforts of the parties in their mutual attempt to reach settlement. A court may order the parties to recognize one another and sit down to bargain, but upon failure of the statutory machinery to induce settlement, the judiciary is denied power to enjoin resort to traditional self-help measures. If this scheme has proved ineffective, Congress, not this Court, must redress the deficiencies.

I would affirm.

APPENDIX G

United States Court of Appeals
for the Seventh Circuit

Number 18145

Chicago and Northwestern Railway Company,
Plaintiff-Appellant,

v.

United Transportation Union,
Defendant-Appellee.

OPINION

March 6, 1970
(422 F.2d 979)

Before SWYGERT, *Chief Judge*, FAIRCHILD and KERNER, *Circuit Judges*.

KERNER, *Circuit Judge*. This opinion contains our decision in two appeals. No. 18145 is the appeal of the Chicago and North Western Railway Company (Railway) from the district court's finding that § 2, First,[1] of the Railway Labor Act (45 U.S.C. § 152, First) requiring the parties to exert "every reasonable effort" to settle their disputes was not a requirement which anticipated judicial

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[1] 45 U.S.C. § 152, First, provides:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

enforcement. Consequently, since the district court found that it did not have jurisdiction to decide whether § 2, First, was complied with, and all other procedures of the Railway Labor Act having been exhausted, the district court held that the Norris-LaGuardia Act[2] prohibited the enjoining of a threatened strike by the United Transportation Union (Union). The district court, however, granted an injunction against the threatened Union strike pending an appeal of its decision of the justiciability of § 2, First, and the correctness of the court's order granting the injunction pending appeal is the subject of the second appeal, No. 18109, in which the Union is the appellant. We affirm the decision of the district court in both appeals.

The factual basis of the two appeals arose out of a dispute between the United Transportation Union and the Chicago North Western Railway Company over the question of how many brakemen should be employed on the Railway's trains. Such a dispute is commonly known as a crew consist controversy. The dispute was initiated in July of 1965 by service by the Union upon the Railway of notices pursuant to § 6 of the Railway Labor Act (Act) (45 U.S.C. § 156)[3] requesting a change in agreements to

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[2] Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) provides in relevant part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> * * * * * * *

[3] Section 6 (45 U.S.C. § 156) provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between

require that not less than two brakemen be employed on every freight and yard crew. In response, the Railway in December of 1965 served notices requesting an agreement that the existing rules respecting minimum crews be rescinded and the matter of crew size be committed to the judgment of management [4]

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the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

[4] While the historical background of the litigation involved in crew consist controversies is not directly relevant, a brief discussion of the more recent developments in this area may be helpful for a more meaningful grasp of the problems.

The dispute over the number of brakemen to be employed began to be discussed in 1959 when most of the nation's railroads served notices upon various unions under § 6 of the Act proposing rules that would permit, in the discretion of management, the elimination of firemen and reduction in the number of brakemen. The unions countered in 1960 by serving uniform notices proposing a national rule requiring a minimum of two brakemen on every crew.

The issues were joined and negotiated on an industry-wide basis and were not resolved until in the face of a threatened nationwide strike the Congress enacted a compulsory arbitration statute. (77 Stat. 132).

Under the arbitration prescribed by the Congress in 1963, Arbitration Board No. 282 established a national procedure for resolving the "crew consist" issue over the number of brakemen on train crews. The parties were directed to conduct local negotiations on each carrier, and, in the event of failure of agreement, to conduct local arbitration, all pursuant to national guidelines respecting questions of work burden and safety.

The arbitration award expired in January of 1966. The United Transportation Union served notices upon more than eighty railroads pursuant to § 6, proposing restoration of the crew of one

By November of 1969, the parties had held conferences pursuant to § 6 (45 U.S.C. § 156);[5] the National Mediation Board had mediated the dispute after invocation of mediation pursuant to § 5 (45 U.S.C. § 155);[6] the Board, pursuant to § 5, had concluded that its efforts had been unsuccessful and had proffered arbitration; the Railway had accepted that proffer but the Union declined; the Board thereupon, on October 16, 1969, had terminated its services pursuant to § 5. The President had not appointed an Emergency

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conductor and two brakemen. The railroads responded with a request for an agreement permitting crew reductions beyond those authorized under the award of Arbitration Board No. 282.

[5] See footnote 3, *supra*.

[6] Section 5 First and Second (45 U.S.C. § 155 First and Second) provide:

> First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:
>
> (a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
>
> (b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.
>
> The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.
>
> In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.
>
> If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made

Board under § 10 (45 U.S.C. § 106),[7] and the § 5 thirty day "cooling off" period respecting maintenance of the status quo had expired.

At the end of November, the Railway instituted a lawsuit in the district court asking the court to declare that the procedures of the Railway Labor Act had not been exhausted and to enjoin the Union from exercising self-help in the form of strike. The Railway alleged that the Union had not discharged all its obligations under the Railway Labor Act in that it had not complied with § 2, First, which imposes upon the parties the "duty to exert every reasonable effort" to settle their disputes. At the same time the Railway filed its complaint it moved for a temporary restraining order which the court granted.

The Railway then presented evidence to show that the Union had violated § 2, First, by not bargaining in good faith. At the conclusion of the Railway's case, the court granted defendant Union's motion to dismiss the complaint and dissolved the temporary restraining order on the basis that:

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in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

[7] 45 U.S.C. § 160 provides:

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to in-

§2, First, . . . is a matter for administrative determination and has been determined by the National Mediation Board under the provisions of Sections 5 and 6 of the Railway Labor Act, 45 U.S.C. 155, 156, is not justiciable and this Court does not have jurisdiction to consider or adjudicate disputes with respect to compliance with such subsection, particularly after the National Mediation Board has relinquished its mediatory jurisdiction of a dispute as in this case.

The district court, however, recognizing that there was case law contrary to its decision, that a strike would result in a mooting of the appeal, and that "such a strike would irreparably injure the plaintiff and the public," granted plaintiff Railway's motion for an injunction pending appeal.

Three days after the district court's decision, the Union filed an emergency motion in this court to vacate the in-

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vestigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

junction pending appeal. This court issued an order directing that the Union's motion to vacate the injunction pending appeal be taken with the Railway's appeal from the district court's denial of an injunction below. The order also directed that the appeals be expedited. (See *Chicago and North Western Railway Company v. United Transportation Union*, No. 18109 unpublished order, 7th Cir. Dec. 19, 1969.)

By ordering that the Union's motion to vacate the injunction pending appeal be taken with the expedited appeal from the district court's denial of a preliminary injunction, we, in effect, upheld the granting of the injunction pending appeal. Our order of December 19, 1969, in that respect is inconsistent with this court's decision in *Elgin J. & E. Ry. Co. v. Brotherhood of Railroad Trainmen*, 302 F. 2d 545 (7th Cir. 1962), which held that if the Norris-LaGuardia Act prohibits the granting of an injunction below it also prohibits the granting of an injunction pending appeal. We are no longer of the opinion that the *Elgin* case is the correct interpretation of the Norris-LaGuardia Act as it applies to injunctions pending appeal and overrule our decision in *Elgin*. While it may be argued that our decision upholding the district court's denial of a preliminary injunction because of the non-justiciability of § 2, First, [see pp. 98a-106a *infra*] moots the question of whether the district court erred in granting an injunction pending appeal, the necessity of an explanation of our inconsistent action in our December 19, 1969, order maintaining the injunction pending an expedited appeal and the realization that the continued adherence to an incorrect opinion could cause irreparable harm for many years before the case comes before this court in a technically correct posture, persuades us that the question is not moot but should at this time be decided.

We hold that the Norris-LaGuardia Act does not prohibit the district court from granting an injunction

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pending appeal even though the court determines that Norris-LaGuardia prohibits an injunction below. The power of a district court to grant an injunction to maintain the status quo pending appeal was first codified by the "All Writs Act" contained in the Judiciary Act of 1789, 28 U.S.C. § 1651. In *Scripps-Howard Radio, Inc. v. F.C.C.*, 316 U.S. 4 (1942), the Supreme Court in upholding this power stated:

> It has always been held, therefore, that as a part of its traditional equipment for the administration of justice, a federal court can stay enforcement of a judgment pending the outcome of an appeal.
>
> *Id.* at 9-10.

See also Hovey v. McDonald, 109 U.S. 161 (1883). Absent the prohibitions of the Norris-LaGuardia Act, the law is established that even if a district court determines it lacks jurisdiction to grant an injunction pending appeal, it has the power to preserve appellate review of its determination that it lacked jurisdiction. *See United States v. Shipp*, 203 U.S. 563, 573 (1906); *see also Peltway v. American Cast Iron Pipe Co.*, 411 F. 2d 998, 1002-3 (5th Cir. 1969); *Eastern Greyhound Lines v. Fusco*, 310 F. 2d 632, 634 (6th Cir. 1962).

In the instant case as in this court's earlier opinion in the *Elgin* case, the injunction pending appeal was issued pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.[8] The Rule itself is not a jurisdictional grant but merely a codification of a district court's power

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[8] Rule 62(c) of the Federal Rules of Civil Procedure provides in relevant part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

to maintain the status quo pending appeal. In *Elgin*, the court relied on Rule 82 of the Federal Rules of Civil procedure[9] which provides that the promulgation of the Federal Rules does not expand the district court's jurisdiction, and Rule 65(e)[10] which provides that the Federal Rules "do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee." The *Elgin* court construed Rules 82 and 65(e) as denying the power of the district court to grant an injunction pending appeal pursuant to 62(c) in cases where the Norris-LaGuardia Act prohibited the granting of an injunction in the district court. The *Elgin* court's application of the three Federal Rules of Civil Procedure is correct only if we begin with the premise that Congress by enacting the Norris-LaGuardia Act intended to limit in labor disputes the inherent power of district courts under the "All Writs Act" to grant injunctions pending appeal. If the Congress did not intend such a limitation on the district court's power, Rule 62(c) can be applied without any conflict with the dictates of Rule 82 and Rule 65(e).

There is nothing in the text of the Norris-LaGuardia Act or in the legislative history surrounding the drafting and enactment of the Act indicating a Congressional intent to remove from the district courts their long-rec-

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[9] Rule 82 provides in relevant part:

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

[10] Rule 65(e) provides:

These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C. § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C. § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

cognized power to grant injunctions pending appeal. To remove from the district courts the power to grant injunctions pending appeal and thus the power to maintain the status quo in all cases where the district court has decided that the Norris-LaGuardia Act prohibited an injunction is to in effect make the district court the court of last resort on these matters regardless of the difficulty or novelty of the issues involved. In the absence of any specific Congressional intention to remove the power of district courts to grant injunctions pending appeal, we decline to read into the Act such a serious limitation into the judicial review process.

The United States Supreme Court in *United States v. United Mine Workers*, 330 U.S. 258 (1947) supports our decision. The question before the district court in United Mine Workers involved the applicability of the Norris-LaGuardia Act so as to bar the United States from securing an injunction against a strike by United Mine Workers. The district court granted a temporary restraining order which the Union did not obey and the district court found the Union officers to be in contempt. The Supreme Court affirmed the judgment of contempt, finding the Norris-LaGuardia Act inapplicable. The Court went on to hold, however, that even if Norris-LaGuardia applied, the district court still had the power to preserve the status quo while it decided the underlying jurisdictional issue posed by Norris-LaGuardia:

> In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purposes of preserving existing conditions pending a decision upon its own jurisdiction.
> 330 U.S. at 290.

While it is true that *United Mine Workers* involved a temporary restraining order and not as the case at bar an injunction pending appeal, both cases deal with

difficult questions of jurisdiction. We read the Supreme Court's holding in *United Mine Workers*, that despite the prohibitions of Norris-LaGuardia the district court has inherent injunctive power to grant a temporary restraining order to preserve the status quo while deciding difficult or novel questions determining its own jurisdiction, as support for the proposition that the district court, despite Norris-LaGuardia, also has the inherent power to grant an injunction pending a review of its determination of these jurisdictional issues.

The reasoning of Justice Frankfurter in his concurring opinion in *United Mine Workers* would seem to accept our analysis and its extension to this case. Although Justice Frankfurter was of the opinion that the Norris-LaGuardia Act prohibited permanent injunctive relief in the factual situation, he concurred in the majority's result on the basis that the Norris-LaGuardia Act did not bar interim injunctive relief necessary to preserve the status quo while the court decided the jurisdictional question and while that district court jurisdictional determination was being reviewed by the appellate court:

> To suggest that the right to determine so complicated and novel an issue could not be brought within the cognizance of the district court, *and eventually of this court*, is to deny the place of the judiciary in our scheme of government. 330 U.S. at 310 [emphasis supplied].

Although this issue has not been discussed in depth by other courts of appeals, the circuits which have been faced with the problem of district court injunctions pending appeal in a labor dispute have acted consistently with our decision in this appeal. See *Missouri-Kansas-Texas RR. Co. v. Brotherhood of Railroad Trainmen*, 342 F. 2d 298 (5th Cir. 1965); *Texas and N.O. RR. Co. v. Brotherhood of Railroad Trainmen*, 307 F. 2d 151, 153,

163 (5th Cir. 1962); *Pan-American World Airways v. United Brotherhood of Carpenters*, 324 F. 2d 217 (9th Cir. 1963; the district court, though denying a preliminary injunction, granted a 10-day stay to preserve the status quo pending appeal to the Court of Appeals); *Norfolk & P.B.L. RR. Co. v. Brotherhood of Railroad Trainmen*, 248 F. 2d 34 (4th Cir. 1957; the district court ordered the temporary injunction dissolved, though by supplemental order, the execution of the court's judgment was suspended pending appeal by the carrier).

While we are cognizant of the purposes of the Norris-LaGuardia Act to remove the injunctive power of the judiciary from the field of labor disputes, we are also mindful of the necessity of judicial review to our legal system. In the absence of a specific Congressional directive, we strike the balance in favor of maintaining the status quo to allow time for a meaningful judicial review.[11] [11a]

We now come to the Railroad's appeal in No. 18145 from the decision of the court below that § 2, First, of the Railway Labor Act (45 U.S.C. § 152) is non-justiciable. We are of the opinion that § 2, First, does not contemplate judicial enforcement of its "reasonable effort" requirement and, therefore, affirm the decision of the district court judge.

We construe § 2, First, as a statement of the purpose and policy of the subsequent provisions of the Act and

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[11] We also reject the appellant Union's contention that the district court abused its discretion in granting the injunction pending appeal. We find no such abuse. Nor do we find the form of the injunction issued pending appeal improper.

[11a] Since this opinion overrules *Elgin J. & E. Ry. Co. v. Brotherhood of Railroad Trainmen*, 302 F. 2d 545 (7th Cir. 1962), we have circulated it to the full active court. No judge has requested a hearing *en banc*.

not as a specific requirement anticipating judicial enforcement.

> Nor does § 2 Second make justiciable what otherwise is not. . . . But § 2, Second like § 2, First merely states the policy which those other provisions buttress with more particularized commands. *General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Company*, 320 U.S. 323, 334 (1943).

To imply judicial enforcement to § 2, First, would insert a judicial inquiry into every step of the Railway Labor procedures to determine in each case if reasonable effort is being exerted; this is a role which we believe Congress did not intend the courts play in the settlement of Railway disputes.

In *General Committee v. M.-K.-T. RR. Co., supra,* the Supreme Court in deciding certain questions of representation under the Railway Labor Act were not justiciable stated:

> In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and involved the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been small, it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. *The inference is strong that Congress intended to go no further in its use of the processes*

of adjudication and litigation than the express provisions of the Act indicate.

Id. at 332-33. [emphasis supplied].

Later in its opinion the Court reiterated:

> [T]he conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else is left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability. *Id.* at 337.

We believe that § 2, First, was intended to play an integral part in facilitating the other more specific procedures of the Railway Act: "The heart of the Railway Labor Act is the duty, imposed by § 2 First upon management and labor. . . ." *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969). However, we find that the role of determining whether "reasonable effort" is being practiced by the parties is not a judicial one but a role which should be left to the National Mediation Board.

Under the procedures of the Act, the National Mediation Board plays the dominant role in major disputes within the framework of the Act. Section 6 of the Act provides:

> [I]n every case . . . where the services of the Mediation Board have been requested by either party or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by § 5 of this Act, by the Mediation Board.

Section 5 provides in pertinent part that after the services of the Board are invoked or proffered:

> [S]aid Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.
>
> If arbitration at the request by one or both parties shall be refused, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under § 10 of this Act, no change shall be made in the rates of pay, rules or working conditions or established practices in effect prior to the time the dispute arose.

Thus it can be seen that the Mediation Board plays a pivotal role in the workings of the Act. It maintains the status quo, attempts to bring about a voluntary settlement between the parties, tries to induce the parties to submit to arbitration after a determination that voluntary settlement cannot be reached, and then in effect, if § 10 and the Emergency Board are not appropriate, the Mediation Board after a thirty-day period releases its hold on the status quo.

We believe this integral role of the Mediation Board requires it and not the judiciary to enforce compliance with § 2, First. The Mediation Board is certainly better qualified to determine if the parties are exercising reasonable effort in settling their dispute. If the Mediation

Board is of the opinion that one of the parties is not negotiating in good faith, it may simply retain jurisdiction over the mediation process until it believes good faith is being exercised. The Act provides that while the Board retains jurisdiction the parties must maintain the status quo. The Board can refuse to certify that "its mediatory efforts have failed" and thus prevent the exercise of self-help until it is satisfied that its mediatory efforts had a chance to fail, *i. e.*, that the parties were bargaining in good faith. Mediation cannot fail if it never had a chance to succeed.[12]

Instead of involving the federal courts in the determination of whether a reasonable effort had been exercised, after all the procedures of the Act have been completed, it seems much more efficient and sensible to allow the Mediation Board while the Act's procedures are being carried out to determine if a reasonable effort is being exercised by the parties. To allow the Mediation Board rather than the courts to perform this function removes the courts from having to issue injunctions in labor disputes (because § 2, First, had not been complied with), thus avoiding conflict with the dictates and policy of the Norris-LaGuardia Act. In addition, a judicial enforcement of § 2, First, would also require the federal courts to remand the dispute back to a certain stage in the procedures of the Act where one party was not bargaining in good faith. We find no machinery nor guidelines in the Act which would aid the court in making this difficult determination.

We are mindful that the role of the Mediation Board is basically a non-adjudicatory one, *see e.g., Detroit &*

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[12] Of course, if one party is not negotiating in good faith as a dilatory tactic to prevent the other party from eventually exercising self-help, the Board can decide to release jurisdiction of the dispute and allow the procedures of the Act to be exhausted in order to allow for self-help.

Toledo Shore Line Railroad Company v. United Transportation Union, ... U.S. ... (Dec. 9, 1969, Slip Opinion, page 17). However, we recognize that for the procedures of the Act to be effective, the Mediation Board must accept in certain instances a limited "quasi adjudicatory" posture. Certainly the authority conferred on the Board pursuant to § 2, Ninth[13] (45 U.S.C. § 152, Ninth), to determine the proper representatives of the employees can be considered adjudicatory or quasi adjudicatory in nature. Similarly, we interpret § 2, First, to confer on the Board pursuant to its express mediatory power, the power, whether it may be considered adjudicatory or quasi adjudicatory, to make sure the parties are exercising every reasonable effort. We do not feel this limited power under

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[13] 45 U.S.C. § 152, Ninth, provides:

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter, in such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

§2, First, will significantly impair the Board's impartial job as a mediator.

We find that the expertise, proximity to the negotiation process and power to maintain the status quo of the Mediation Board make it singularly well suited to implement the Congressional intent and purpose behind the inclusion of § 2, First. While we agree that the procedures of the Act are purposely long and drawn out in order for the parties to reach agreement and prevent invocation of self-help, we are of the opinion that the tacking on of judicial review after a completion of the Act's procedures does nothing but involve courts in intricate factual questions of intent while unreasonably postponing the parties' right to self-help.

The Railway places great reliance that § 2, First, is justiciable upon the Supreme Court's decision in *Virginia Ry. v. System Federation,* 300 U.S. 515 (1937). In *Virginia Ry.,* the railroad had refused to engage in collective bargaining with the Federation after the National Mediation Board, acting under §2, Ninth, of the Railway Act, determined and certified the Federation to be the representative of the shop craft employees for collective bargaining with the railroad. The Supreme Court upheld a district court injunction which required the railroad to recognize and bargain with the Federation despite the railroad's argument that §2, Ninth, was not justiciable. While the injunction also required the railroad to make every reasonable effort to settle disputes with the Federation thus in fact invoking the dictates of §2, First, the opinion did not state nor imply that whether reasonable effort is in fact complied with by either party was a question for the courts to answer. The Supreme Court did not suggest that the district court retain jurisdiction to determine if the parties were negotiating in good faith, nor did it suggest a further judicial proceeding if con-

ferences between the railway company and the Federation failed. Thus while *Virginia Ry.* holds that § 2, Ninth, contemplates judicial enforcement of the requirement to bargain with the Board's accredited employee representative, it does not hold that judicial enforcement is available to determine whether the parties are in fact negotiating in good faith. As we read *Virginia Ry.* it allows for judicial enforcement of the specific dictates of §2, Ninth, and simply provides that when the carrier and the employees' representatives are negotiating they should be guided by the other provisions of the Railway Labor Act including §2, First.

In addition, to *Virginia Ry.*, the railway also relies on a recent decision by the Fourth Circuit in *Piedmont Aviation, Inc. v. Air Line Pilots Ass'n Int'l,* 416 F. 2d 633 (4th Cir. 1969) (petition for cert. filed, 38 U.S. L.W. 3241, Jan. 6, 1970, No. 995), in which the court upheld a district court injunction against a threatened strike. The court in a holding opposite to our conclusions found:

> Restraining the parties from self-help through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the Congressional purpose of providing machinery to prevent strikes without creating an irreconcilable conflict with the Norris-LaGuardia Act. *Id.* at 636.

and thus held §2, First, to be justiciable. We cannot agree with the Fourth Circuit decision. The machinery to prevent strikes which was the Congressional purpose in enacting the Railway Labor Act is contained within the procedures of the Act and not outside it in the injunctive power of the federal courts. We believe that the provisions of the Act and the powers of the National Mediation Board can enforce the duty to bargain in good faith without the need of judicial interference.

Affirmed.

APPENDIX H

United States District Court
Northern District of Illinois
Eastern Division
No. 69 C 2401

Chicago and North Western Railway Company, a Corporation,

Plaintiff,

vs.

United Transportation Union, a Voluntary, Unincorporated Labor Association,

Defendant.

December 11, 1969
(unreported)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on to be heard on plaintiff's verified complaint as amended; defendant's motion to vacate the temporary restraining order; plaintiff's motion for preliminary injunction and defendant's motion to dismiss; the first and second defenses in defendant's verified answer and, the Court having heard the evidence, considered the briefs of the parties and heard the arguments of counsel with respect thereto, and being fully advised in the premises, makes the following findings of fact and conclusions of law:

1) Plaintiff is now and was at all times herein mentioned a corporation, as were and are other railroads with which it has merged and which it controls, and is engaged in the business of transporting persons and property by rail in interstate commerce in the Eastern Division of the Eastern

Judicial District of Illinois and elsewhere in the State of Illinois and other states of the United States and is a "carrier" within the meaning of and subject to the Railway Labor Act, 45 USC 151 *et seq.*

2) Defendant is a voluntary, unincorporated labor association, the successor to the Brotherhood of Railroad Trainmen, the Switchmen's Union of North America and other voluntary, unincorporated labor associations and is, as were its predecessors the "representative" under the Railway Labor Act, *supra,* of employees of plaintiff and the corporations with which it has merged and which it controls, hereinafter "Defendant" and is engaged in business as such "representative" in the Eastern Division of the Northern Judicial District of Illinois and elsewhere in the State of Illinois and other states of the United States.

3) The jurisdiction of the Court is invoked by plaintiff under 45 USC §§ 1331 and 1337 as an action arising under the constitution and laws of the United States in which the amount in controversy exceeds $10,000.00 exclusive of interest and costs and as an action under the Railway Labor Act, 45 USC 151 *et seq.,* an Act of Congress regulating commerce, particularly Section 2 First, 45 USC 152 First, thereof.

4) Plaintiff seeks an injunction against a strike and picketing of plaintiff by defendant over a dispute between plaintiff and defendant with respect to whether plaintiff shall have the unrestricted right to determine number and craft of persons to be employed in crews in trains and yard service or whether a specified minimum number of persons shall be employed in such crews; the ground for plaintiff's action is that defendant has not complied with Section 2 First, of the Railway Labor Act, *supra,* which provides that it shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates

of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

5) Defendant denies that Section 2 First of the Railway Labor Act is justiciable and denies that the Court has jurisdiction under the Norris-LaGuardia Act, 29 USC 101, *et seq.*, particularly Sections 4, 7 and 8 thereof, to issue the injunction sought by plaintiff; the requirements of the Railway Labor Act with respect to the dispute between plaintiff and defendant having been exhausted.

6) In July 1965, defendant served a notice on plaintiff and at about the same time on other railroads, under the provisions of Section 6 of the Railway Labor Act, 45 USC 156 of its desire for a collective agreement with plaintiff to be effective January 25, 1966 at the expiration of the Award of Arbitration Board No. 282 which had been established under and in pursuance of Public Law 88-108, 45 USC 157 (1969 Supp.) for a specified minimum number of persons to be employed by plaintiff in crews in train and yard service.

7. Plaintiff, like other railroads on which defendant served the aforementioned notice, refused to negotiate with defendant with respect thereto on the ground it was not required by the Railway Labor Act to do so because the notices were served during the effective period of the Award of Arbitration Board No. 282. Whereupon, defendant requested the National Mediation Board to assume jurisdiction of the dispute arising from such notice and the National Mediation Board did assume jurisdiction thereof in October 1965.

8. In December 1965 plaintiff, as did other railroads, served a notice on defendant under the provisions of Sec-

tion 6 of the Railway Labor Act, 45 USC 156 of its desire for a collective agreement with plaintiff for the railroad to have the unrestricted right to determine the number and the craft of persons to be employed in crews in train and yard service and further proposed that such notice be handled concurrently with the notice theretofore served on it by defendant in July 1965 and that, if no agreement should be reached by plaintiff and defendant with respect to such notices, the dispute arising therefrom be further handled under the Railway Labor Act in conjunction and concurrently with disputes between defendant and other railroads arising from similar notices served at about the same time. Such notice was served and such proposals were made by plaintiff and by other railroads expressly subject to the position that it was not required by the Railway Labor Act to negotiate with defendant with respect to the notice served by defendant on plaintiff in July 1965.

9. In January 1966, plaintiff and defendant met with respect to the notice and proposals served in December 1965 by plaintiff upon defendant. No agreement was made. Defendant refused to negotiate concurrently with plaintiff with respect to the notice served by defendant on plaintiff in July 1965. Defendant further refused to negotiate both of said notices in conjunction each with the other or with disputes between defendant and other railroads arising from similar notices served at about the same time. Plaintiff refused to negotiate with defendant independently of similar disputes between defendant and other railroads.

10. Thereafter plaintiff requested the National Mediation Board to, and it did, assume jurisdiction of plaintiff's dispute with defendant arising from the notice served by plaintiff on defendant in December 1965, as did other railroads, with respect to disputes between them and defendant arising from similar notices served by them on defendant in December 1965.

11. From time to time from January 1966 until June 1969, plaintiff and defendant conferred with respect to the dispute arising from the aforementioned notices served by and upon plaintiff and defendant in 1965 but made no agreement settling the dispute.

12. On October 16, 1969, after a proffer by the National Mediation Board to the parties to submit the dispute arising from their aforementioned notices to arbitration was accepted by plaintiff but declined by defendant, the National Mediation Board notified the parties that "it is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement", and terminated its jurisdiction of the aforementioned dispute between plaintiff and defendant effective that date.

13. The President of the United States has not established an emergency board to investigate the dispute between the parties hereto arising from their respective 1965 notices heretofore mentioned.

14. The evidence shows that at all times the defendant has taken the position that the only agreement that could be reached was and is that reached by nearly all of the railroads in the United States with defendant, which requires a restoration of approximately 95% of all of the jobs in question.

15. The court does not find as a matter of fact that either of the parties have been guilty of bad faith in bargaining but finds the question of good faith is delegated to the National Mediation Board and has been resolved and is not an issue before this court.

Conclusions of Law

1. This action arises out of and involves a labor dispute within the meaning of the Norris-LaGuardia Act, 29 USC Section 101, *et seq.*

2. Whether there has been compliance with Section 2 First of the Railway Labor Act, 45 USC 152 First, providing that it shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof is a matter for administrative determination and has been determined by the National Mediation Board under the provisions of Section 5 and 6 of the Railway Labor Act, 45 USC 155, 156, is not justiciable and this Court does not have jurisdiction to consider or adjudicate disputes with respect to compliance with such subsection, particularly after the National Mediation Board has relinquished its mediatory jurisdiction of a dispute as in this case.

3. The requirements of the Railway Labor Act having been exhausted for more than thirty days with respect to the dispute between plaintiff and defendant arising from the notices served by defendant on plaintiff in July 1965 and by plaintiff on defendant in December 1965 with respect to the number and craft of persons to be employed by plaintiff in its train and yard crews, the Court did not and does not have jurisdiction under the provisions of Sections 4 and 7 of the Norris-LaGuardia Act, 29 USC 104, 107, to issue an injunction, either temporary or permanent against defendant striking and picketing plaintiff as sought by plaintiff herein.

4. Defendant is entitled to receive from plaintiff recompense for loss, expense or damage sustained by defendant as a result of the issuance of the temporary restraining order on November 19, 1969 including all reasonable costs in the defense of such order and in opposing the injunction sought by plaintiff in this proceeding.

5. Defendant's motion to vacate the temporary restraining order heretofore issued should be denied as the question is moot; plaintiff's motion for preliminary injunction should be denied; defendant's motion to dismiss plaintiff's complaint should be allowed, and an appropriate decree should be entered for such purposes.

Final Decree

This cause coming on to be heard on the verified complaint of the plaintiff filed herein on November 20, 1969 as amended; on plaintiff's motion for a preliminary injunction; on defendant's motion filed November 21, 1969 to vacate the temporary restraining order issued herein on November 19, 1969 which was once extended by an order of the Court and thereafter by agreement of the parties until 6:00 p.m., December 12, 1969 and on plaintiff's motion for a preliminary injunction and defendant's motion to dismiss which are part of defendant's verified answer filed herein on December 2, 1969, and

The Court having heard and considered the testimony and written evidence offered by plaintiff in support of its motion for a preliminary injunction and by defendant in opposition thereto and in support of its motions to vacate the temporary restraining order, and to dismiss the complaint and action on December 2, 3, 4 and 5, 1969 and having heard and considered the briefs submitted by and the arguments of counsel and

The Court having tried the action upon the facts without a jury and having heretofore specially found the facts and separably stated its conclusions of law thereon and having directed the entry of an appropriable [sic] decree, it is

Ordered, Adjudged and Decreed that:

1. Defendant's motion to vacate the temporary restraining order issued November 19, 1969 against a strike by defendant is denied, the question now being moot.

2. Plaintiff's motion for preliminary injunction is denied.

3. The plaintiff shall recompense, and pay to, the defendants herein their loss, expense, or damage caused to the defendants by the issuance of the Temporary Restraining Order herein on November 19, 1969 including all reasonable costs and expense of defense against the order and against the granting of injunctive relief sought in this proceeding and subsequently denied by this Court. For the purpose of determining the amount thereof, this Court reserves jurisdiction of this cause for this purpose only. Hearing thereon will be set upon motion when time for appeal has passed. If appeal is taken, hearing will be set after final mandate herein.

4. Subject to the jurisdiction reserved in the preceding paragraph, defendant's motion to dismiss the complaint is allowed and the complaint and this action is dismissed at plaintiff's cost.

APPENDIX I

RAILWAY LABOR ACT

Section 2 First, 45 U.S.C. 152, First:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 5 First (a), (b), 45 U.S.C. 155, First (a), (b):

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Section 6, 45 U.S.C. 156:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

NORRIS-LAGUARDIA ACT

Section 4, 29 U.S.C. 104:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

* * * * * * *

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

Section 7, 29 U.S.C. 107:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, * * *

Section 8, 29 U.S.C. 108:

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-758

UNITED TRANSPORTATION UNION, *Petitioner,*

v.

CHICAGO AND NORTH WESTERN RAILROAD COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Respondent railroad sought an injunction against a strike by petitioner union on the ground that, while the union in form had gone through all the "major disputes" procedures of the Railway Labor Act (45 U.S.C. §§ 151-160), including conferences and mediation, it had not done so in a manner that satisfied its duty under Section 2 First of the Act to "exert every

reasonable effort" to settle the dispute. The district court held that the union had violated Section 2 First during conferences and mediation and ordered the parties to resume bargaining. Then, after further conferences, but without requiring the parties to seek further mediation, the district court held that the union had satisfied Section 2 First, had exhausted all the procedures required by the Act, and therefore was free to strike. The court of appeals reversed, holding that the Section 2 First obligation must be met in mediation as well as in initial conferences and thus that the union had not exhausted the procedures of the Act because it had not participated in mediation in good faith.

The question presented is: Could the union exhaust the procedures prescribed by the Act without exerting every reasonable effort to settle the dispute in mediation under the auspices of the National Mediation Board?

STATEMENT

In 1963 and 1964 through legislation and ensuing arbitration,[1] virtually all the nation's railroads, including respondent Chicago & North Western (the "C&NW" or "carrier"), were permitted to reduce the size of many of their train crews, generally from

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[1] To halt a nationwide strike over railroad proposals for changes in operating rules, Congress enacted a statute, 77 Stat. 132 (1963), requiring arbitration between the railroads and their operating unions over the use of "firemen" on diesels and the size of train crews—"crew consist." After hearings, Arbitration Board No. 282 (1963) remanded the crew consist question to negotiation and arbitration on individual railroads pursuant to national guidelines set by that Board. Several agreements and awards reached under this procedure permitted the C&NW to operate 215 crews with one brakeman instead of two. *App. D to Pet.*, at p. 12a.

two brakemen to one. In 1965 the predecessor of the United Transportation Union (the "UTU" or "union") served notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) demanding restoration of two brakemen on all crews; and the railroads served counter-notices proposing additional crew reductions. In 1968 and 1969 the C&NW and the UTU held bargaining conferences on these notices and, in 1969, mediation sessions under the auspices of the National Mediation Board (the "NMB") pursuant to Section 5 (45 U.S.C. § 155). Failing agreement, the NMB proffered arbitration, which the UTU rejected. The NMB then terminated its mediatory services, and the carrier subsequently commenced this action to enjoin a threatened strike. *App. D to Pet.*, at pp. 12a, 18a-25a.

The C&NW contended that the union had in conferences and mediation failed "to exert every reasonable effort" to settle the dispute in violation of Section 2 First of the Act (45 U.S.C. § 152 First), the "good faith bargaining" provision of the Act. The district court dismissed on the ground that Section 2 First was not justiciable (*App. H to Pet.*, p. 107a), and the court of appeals affirmed. *Chicago & N.W. Ry.* v. *United Transportation Union*, 422 F.2d 979 (7th Cir. 1970), *App. G to Pet.*, p. 88a. This Court reversed, however, 402 U.S. 570 (1971), *App. F to Pet.*, p. 60a, holding Section 2 First enforceable by injunction and remanding for a determination of the case on the merits.

On remand the district court found that the union had violated Section 2 First in conferences and mediation by refusing to bargain with the carrier at all on two subjects and by a "take it or leave it" stance in the dispute overall. 330 F.Supp. 646 (N.D. Ill. 1971),

App. E to Pet., at pp. 52a-53a. The court therefore enjoined the union from striking until it had exhausted the procedures required by the Act—including mediation—in compliance with Section 2 First and directed further bargaining. *Id.* at 57a-58a. The parties held new conferences; and at a conference on the day before a second hearing by the district court, the carrier asked the union to join with it in requesting the NMB to reassign a mediator to the case. On the morning of the hearing the UTU refused. The district court then held, nevertheless, that the UTU had bargained in compliance with Section 2 First during the new conferences, and that by that step alone—without resort to mediation—the union had exhausted the procedures of the Act and gained the right to strike. 336 F. Supp. 1149 (N.D. Ill. 1971), *App. D to Pet.*, at pp. 39a *et seq.* An injunction pending appeal was nevertheless issued.[2] The court of appeals reversed, holding that the UTU could not strike until it had also gone through the mediation step in the Act's procedures at a time when the union was in compliance with Section 2 First. The core of its decision was this:

> "However, as the [Supreme] Court points out in the opinion at [402 U.S.] 578: 'The strictest compliance with the formal procedures of the Act is meaningless if one party goes through the motions with a "desire not to reach an agreement"'. That is exactly what happened here when the parties previously went through each step of the procedures. The District Court has found on remand of the case that neither party acted in good faith

[2] The UTU appealed from the granting of the injunction pending appeal, and the court of appeals affirmed. *App. A to Pet.*, at p. 4a. That issue is the subject of the UTU's separate petition for certiorari in No. 72-789.

in exerting every reasonable effort to settle their differences. Having so tainted every step of the required procedures of the Act, it is necessary that they revisit each step in a good faith effort to settle their dispute. The District Court, however, only required that the joint conference step be invoked. We submit that before self-help is permitted that the parties must also exhaust the next step, *i.e.*, the National Mediation Board. This they have not done. This latter step is the very heart of the Act, because it brings into play the mediation expertise of the Board. Still, this most influential and effective step has not in good faith ever been exerted." *App. A to Pet.*, at p. 5a.

In view of its holding that good faith participation in mediation is required, the court of appeals did not reach the C&NW's further contention that the union had not bargained in good faith in the conferences following the remand, other than to state that "the findings of the District Court as to the good faith of the parties in the joint conference stage are such that if they hereafter demonstrate their good faith in mediation, those findings will stand as approved." *App. A to Pet.*, at p. 6a. The UTU's petition for rehearing *en banc* was denied, "no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing." *App. C to Pet.*, p. 8a.

REASONS FOR DENYING THE WRIT

The court of appeals aptly stated the issue in this case to be "what steps of the statutory procedure must be revisited when there has not been a good faith compliance with Section 2 First?" *App. A to Pet.*, at p. 3a. That court resolved the issue by holding that inasmuch

as the lack of good faith in the prior bargaining "tainted every step"—including conferences and mediation—"of the required procedures of the Act," the parties must "revisit each step"—including conferences and mediation—"in a good faith effort to settle their dispute." *Id.* at 5a. In its petition the UTU argues first, that the court of appeals was not required by this Court's June 1971 decision in the case to decide the issue at all and therefore should not have decided it; and second, that further conferences and mediation are not appropriate in the particular circumstances of this case. We think it evident, however, that the issue presented by this case does not merit review because (1) the decision of the court of appeals does not conflict with any decision of this Court and complies with this Court's prior decision in this case, (2) the decision of the only other court of appeals which has had occasion to examine this issue is consistent with that of the court below, (3) the union's arguments against further conferences and mediation turn on the complex history of the bargaining in this particular case, and (4) the decision below is supported by the heavy reliance Congress placed upon mediation in the Railway Labor Act.

1. When this Court held Section 2 First judicially enforceable, it did not determine whether the UTU had in fact violated the Act and thus did not determine the procedure to be followed if such a violation were found. In dissent Mr. Justice Brennan stated with respect to those matters that the Court had provided "absolutely no guidance as to where in the bargaining scheme the parties are to be remanded." 402 U.S. at 597. The UTU in its petition states that this Court "made no reference to whether the parties should be required to

re-visit and re-do any step in the procedures of the" Act (*Pet.*, p. 17.) and contends, therefore, that the court of appeals by deciding the issue "misconceived, misconstrued and failed to apply the decision of this Court" (*Pet.*, pp. 16-18). In other words, the UTU contends that the court below should not have determined the obligations of a party who has violated the Act and wishes to purge itself. The UTU says that such a party should not be required to "revisit" any steps, but nowhere does the union suggest what, if anything, that party should be required to do. The union apparently contends that there are no sanctions for one who has violated Section 2 First, the very issue settled to the contrary by this Court in its 1971 decision in this case.

In fact, this Court did not leave this issue open. The basis for this Court's decision was that the "propriety of judicial enforcement" of Section 2 First turns on making the statutory procedures work, that is,

> "on the importance of the duty in the scheme of the Act, the capacity of the courts to enforce it effectively, and the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory." 402 U.S. at 578.

This Court found that the Section 2 First duty is "central to the effective working of the Railway Labor Act," and that "[t]he strictest compliance with the formal procedures of the Act is meaningless if one party [merely] goes through the motions. . . ." *Ibid.* These principles clearly required the court of appeals both to decide the issue that it did and to decide it in the manner that it did. If a party which merely "goes through the motions" of conferences and mediation need not repeat

those steps while exerting every reasonable effort to settle in compliance with Section 2 First, there cannot be an "effective working" of the Act's required procedures, and the "right of the aggrieved party" to conferences and the assistance of the Mediation Board must surely "prove illusory."

The UTU asserts (*Pet.*, pp. 15-16) that the issue decided below is of huge importance, but it has not documented that assertion and offers no view as to the correct resolution of the issue, except to assert that the resolution of the court of appeals was wrong. Review by this Court should not be premised on naked assertions that an issue is important and was wrongly decided below.

2. Moreover, the decision below does not conflict with that of any other court. Only one court has yet dealt with the question of the procedure to be followed after a violation of Section 2 First, and the conclusion there was wholly consistent with that of the court below. In *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n.*, 416 F.2d 633 (4th Cir. 1969), the Act's procedures—including conferences and mediation—had been formally exhausted. The court of appeals affirmed an injunction against a strike on the ground that the union had not bargained in good faith, saying:

> "Restraining the parties from self-help, through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the congressional purpose of providing machinery to prevent strikes without creating an irreconcilable conflict with the Norris-LaGuardia Act. Restraint conditioned in this respect does not deny the right to strike over a major dispute; but it delays

> this right until the union satisfies the mandate of the Railway Labor Act." 416 F.2d at 636.

The court added that the injunction should be dissolved "when the union complies with the Act," that is, "when proceedings under the Act have been exhausted." *Id.* at 638. The Act's "machinery" referred to includes mediation; and the "congressional purpose of providing machinery to prevent strikes" could only be vindicated by requiring use of that machinery again when, as in the case at bar, the formal steps in the machinery have hitherto been taken faultily.

The UTU contends (*Pet.*, pp. 18-19) that *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581 (D.C. Cir. 1967), conflicts with the decision below. But that case presents no conflict, and indeed it illustrates another reason for denying review—the unusual facts of this case on which the UTU's grounds for review are truly based. When the UTU in 1965 served its Section 6 notices the railroads disclaimed any duty to bargain, because the notices were served prior to the expiration of the Award of Arbitration Board No. 282, which had resolved the national crew consist dispute. In *Akron* the court held that the railroads' position was incorrect, that the railroads had therefore breached their duty to bargain in good faith at the conference stage, and accordingly that the railroads had "forsaken their right to insist on conferences" prior to mediation. 385 F.2d at 597. The UTU claims that the decision below conflicts with *Akron* because in the case at bar the court of appeals treated as pre-mediation conferences the new negotiations ordered by the district court after finding a violation of Section 2 First. But whether or not the C&NW had a right to "insist" upon

pre-mediation conferences after *Akron,* the parties in fact engaged in a long series of conferences prior to mediation in 1968 and 1969. *App. D to Pet.,* at pp. 18a-19a. And the district court in its first decision on remand made a finding—never challenged by the UTU—that the "union did not at any time in the parties' conferences in 1968 and 1969 contend that full-fledged bargaining had been impaired by the carrier's refusal to discuss the union's notices in the summer of 1965." *App. E to Pet.,* at p. 53a. In any event, *Akron* did not hold that a party who does not bargain in good faith while participating in mediation cannot thereafter be required to do so before resorting to self-help and, indeed, did not involve that issue. Hence, the decision below in this case could not and does not conflict with the *Akron* decision.

3. The UTU urges additional issues which turn on the peculiar facts of this case and are accordingly inappropriate for review by this Court. The first (*Pet.,* pp. 19-22) is that participation in further mediation in the manner prescribed by Section 2 First is not required because more than ten days have elapsed since the close of the 1971 conferences, and mediation has been neither invoked by the parties nor proffered by the NMB. Section 6 of the Act requires the parties to refrain from self-help

> "where . . . conferences are being held . . ., or the services of the Mediation Board have been requested . . ., or said Board has proffered its services . . ., unless a period of ten days has elapsed *after termination of conferences* without request for or proffer of the services of the Mediation Board." (Emphasis added).

The second argument (*Pet.,* pp. 22-23) is that since the C&NW has not invoked mediation it has not exerted

"every reasonable effort to settle" the dispute within the meaning of Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108) and is therefore barred from injunctive relief.[3] Neither contention can be reconciled with the facts of record which demonstrate that there was no "termination" of the new pre-mediation conferences before the hearing by the district court. At the conference on the eve of the hearing the carrier asked the union to join in requesting the NMB to reassign a mediator to this dispute. On the morning of the hearing the union refused. *App. D to Pet.*, at p. 39a. Neither party took the position in the district court that there was a "termination of conferences." One ground advanced by the UTU against an injunction pending appeal was that it was the union's "intention to negotiate" further with the carrier, as directed by the union's President, and it did not want these conferences to be "under a threat of an injunction." (*Tr.* of January 6, 1972, *Record*, pp. 83, 87-88; see also *Tr.* of December 22, 1971, p. 11). The UTU

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[3] Apart from the facts, the carrier takes the position that Section 8 of the Norris-LaGuardia Act is not applicable in suits to enjoin a violation of the Railway Labor Act. See the explanation of Representative LaGuardia of his bill at 75 *Cong. Rec.* 5499 (1932) and the pertinent decisions of this Court: *Chicago & N.W. Ry.* v. *United Transportation Union*, 402 U.S. 570, 581 (1971); *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30, 40-41 (1957); *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 458 (1957); *Virginian Ry.* v. *System Federation*, 300 U.S. 515, 562-563 (1937); *Brotherhood of R.R. Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Brotherhood of Locomotive Engrs.* v. *Louisville & N. R.R.*, 373 U.S. 33, 42 (1963); and especially *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232, 237 (1949), where the precise issue of the applicability of Section 8 was raised (*Brief for Respondent*, pp. 16-17, No. 16, O.T. 1949) and the Court held Norris-LaGuardia inapplicable without attempting to distinguish among that Act's various provisions.

will not, we think, deny that conferences have in fact continued on throughout the appellate process. And even were there a genuine factual dispute, it would only illustrate further why the underlying issue decided below ought not be reviewed by this Court in the context of this case.[4]

The UTU's last asserted ground for review (*Pet.*, p. 23) is that because the court of appeals "approved" the finding that the UTU had complied with Section 2

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[4] Even if the facts were otherwise and conferences had terminated, mediation is not, as the UTU asserts, "permissive" for one who would exhaust the Act's procedures and exercise self-help. Section 2 First requires *every* reasonable effort to settle disputes, not merely conferences, "in order to avoid any interruption to commerce or to the operation of any carrier. . . ." *Cf. Brotherhood of R.R. Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S 50, 57-60 (1944), in which this Court construed the "every reasonable effort" language in Section 8 of the Norris-LaGuardia Act to require exhaustion of all three "conciliatory device[s]" provided by the Railway Labor Act—conferences, mediation, and arbitration. The Court explained that to construe the "every reasonable effort language" "as requiring but one of the three methods to be used, when the other two are equally available, would emasculate the language and would defeat the purpose and the policy of the statute." *Id.* at 60. This Court in one of its landmark Railway Labor Act cases, *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 725 (1945), stated that the "statutory scheme" of the Railway Labor Act for resolving major disputes "retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation" and that the "*parties are required to submit to the successive procedures designed to induce agreement.* § 5 First (b)." (Emphasis added). The Court added that these "compulsions go only to insure that those procedures are exhausted before resort can be had to self-help." Of no weight is the contrary dictum in *International Ass'n of Machinists* v. *NMB*, 425 F.2d 527, 537 (D.C. Cir. 1970), relied on by the UTU (*Pet.*, p. 20). The statement was made in a general description of the Act without analysis or citation of authority in a case in which the point was neither in issue nor briefed.

First in the new conferences, no "unlawful acts" have been committed to take this dispute out of the anti-injunction provisions of Section 7 of the Norris-LaGuardia Act (29 U.S.C. § 107).[5] But if the court of appeals was correct in holding that mediation is also required, Norris-LaGuardia does not bar an injunction against a strike pending exhaustion of all the procedures required by the Railway Labor Act—including mediation. *Chicago & N.W. Ry.* v. *United Transportation Union,* 402 U.S. at 581-584.

4. Finally, the decision below serves the central policies of the Railway Labor Act in "major disputes." The court of appeals correctly recognized that resort to the NMB "is the very heart of the Act, because it brings into play the mediation expertise of the Board" and is the "most influential and effective step" in the Act's procedures. *App. A to Pet.,* at p. 5a. The legislative history of the Act is replete with explanations of the critical role of mediation made by the unions' spokesman, Donald R. Richberg, whose statements "are entitled to great weight in the construction of the Act." *Chicago & N.W. Ry.* v. *United Transportation Union,* 402 U.S. at 576. For example, Mr. Richberg explained that upon failure of conferences, "then there is a public interest" in the dispute, a necessity "to bring in the possibility of public intervention to promote peace and harmony," and the "place for the intervention of the

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[5] The court below did not "approve" the findings by the district court concerning the bargaining in the new conferences, but explicitly stated that it did "not pass upon the action of the District Court with reference to its findings of good faith efforts of the parties in their joint conferences," other than to note that those findings "are such that if they [the parties] hereafter demonstrate their good faith in mediation, those findings will stand as approved." *App. A to Pet.,* at p. 6a.

Government Board of Mediation." "Railroad Labor Disputes," *Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7180,* 69th Cong., 1st Sess. (1926), pp. 13-14. Reliance upon mediation, explained Mr. Richberg, was based upon "a continuing history of the increasing success of mediation" in the railroad industry (*id.* at 294), for "the record of mediation" was such that "all parties presenting this bill are seeking now [after the failure of the Railroad Labor Board] to return to the form of Government intervention in industrial differences which has shown in the past the greatest measure of success." (*Id.* at 14; see also pp. 18, 48-49, 52-53, 102-103). This reliance has manifestly proven justified, for the NMB has recently stated that its "record shows a settlement rate of 97.2% of disputes mediated under the auspices of the National Mediation Board, on a yearly average basis." NMB, *Administration of the Railway Labor Act by the National Mediation Board 1934-1970* (1970), p. 104. Indeed, although prospects for settlement through mediation seem slim in a particular case, the policies of the Act nevertheless require resort to mediation. As the Court of Appeals for the District of Columbia Circuit said in *International Ass'n of Machinists* v. *NMB,* 425 F.2d 527, 541 (1970),

> "What is voluntary about mediation, including mediation under this Act, is the decision to accept or reject the result available from the mediation process. What is involuntary about mediation under this Act is the obligation to engage in the mediation process even though a party is not unreasonable from his point of view in his conviction that further mediation is futile. . . . However skeptical of success the court may be it cannot

obliterate even the slim chance of success that may ensue from exhaustion of the process entrusted by Congress to the Mediation Board."

The court of appeals attached appropriate importance to the mediation function in holding that following a failure to exert every reasonable effort to settle disputes in compliance with Section 2 First, in "every step of the required procedures of the Act," the parties are required to "revisit each step in a good faith effort to settle their disputes." *App. A to Pet.*, at p. 5a.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-768

UNITED TRANSPORTATION UNION, *Petitioner*

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY OF PETITIONER TO BRIEF IN OPPOSITION

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REPLY OF PETITIONER TO BRIEF IN OPPOSITION

The principal characteristic of the Brief of Respondent in Opposition to the Petition is its consistent and

calculated effort to obscure, distort and minimize the reasons for granting the Writ. We shall confine our discussion to the major efforts of this sort.

1. The Respondent seeks to minimize the importance of the issues involved. We are accused of not documenting the assertion that the issue decided below is "of huge importance" (Br. Opp., p. 8). It is not deniable that the Court below engrafted upon the decision of this Court in 1971 (Pet. App. F, p. 60a) a requirement that a major dispute under the Railway Labor Act (RLA) must be remediated if it should be found that one of the parties did not discharge its obligation under Section 2, First, of the RLA, which this Court defined only as having exhausted the procedures of the Act with "a desire not to reach an agreement" (Pet. App. F, p. 67a).

This Court in its decision and disposition of this case in 1971 recognized that it was creating important questions of first impression which it might ultimately have to consider (Pet. App. F, pp. 60a, 63a and 73a). Respondent's assertion is indeed surprising in view of the argument made by counsel for Respondent in the District Court in November, 1971. At the conclusion of the evidentiary hearing conducted by the District Court, counsel for Respondent then stated: "As your Honor indicated, it is a case of first impression, involving, as your Honor noted the other day, what is essentially breaking new ground in the law of railway labor act interpretation. Therefore, we conceive it to be a very important case indeed." (Tr. November 18-19, 1971, p. 315).

2. Next, Respondent distorts the questions presented into a single question begging generalization (Br. Opp., pp. 1-2). By this device, Respondent seeks to obscure

the several questions for the resolution of which this Court remanded the case for determination—whether there had been a violation of Section 2, First, in circumstances justifying a strike injunction (Pet. App. F, p. 73a), which necessarily involved the RLA and the Norris-LaGuardia Act (N-LaG Act).

3. Respondent mistakenly tells us (Br. Opp., pp. 3-4) that the District Court enjoined the union from striking until it "exhausted the procedures required by the Act—including mediation—in compliance with Section 2, First." The Respondent does not tell us that the reference is to an interlocutory conclusion of the District Court on August 13, 1971. The District Court did then conclude that there had not been as to this dispute "the sort of mediation contemplated by the Act," but it also concluded, "The Court has no statutory authority to remand the controversy to the Mediation Board" (Pet. App. E, p. 57a).

Furthermore, Respondent does not tell us that at the final hearing before the District Court on November 18-19, 1971, it tried to convince the District Court that the August 1971 interlocutory decree required remediation and that the Court disclaimed any such intention (Tr. November 18-19, 1971, pp. 9-11, 327-329). In the District Court's final disposition of the matter on December 22, 1971, the District Court then found and concluded that both parties had fulfilled their obligations under Section 2, First, of the RLA and again concluded it had "no statutory authority to remand the controversy to the Mediation Board" (Pet. App. D, p. 45a).

4. Perhaps most important, Respondent distorts the bases upon which Petitioner seeks review by this Court of the decision below. This has two aspects:

A. The Respondent does not fairly meet our contention as to the conflict between the decision below and the decision of this Court in 1971. Respondent first asserts the decision of the Court below does not conflict with any decision of this Court and complies with this Court's prior decision in this case and states a contention which we did not make that "The union apparently contends that there are no sanctions for one who has violated Section 2, First, the very issue settled to the contrary by this Court in its 1971 decision in this case" (Br. Opp., p. 7). Respondent seemingly bases its argument upon the fact that this Court did not determine the procedure to be followed if the lower courts should find a violation by the union of Section 2, First, and bases its contention upon an argument in the dissent that, in the event a violation of Section 2, First, should be found, the parties should be remanded to some unspecified point in the exhausted procedures of the RLA (Br. Opp., pp. 6-8), for which the dissent also argued there was no authority (Pet. App. F, p. 86a).

This Court remanded the case for the lower courts to determine whether there had been violation of Section 2, First, of the RLA by the union, i.e., whether the union in exhausting the procedures of the Act did so with a desire not to reach an agreement in circumstances justifying a strike injunction. Petitioner recognizes that the decision of this Court did impose sanctions—a judicial proceeding subsequent to exhaustion of the procedures of the RLA to determine whether there had been compliance with Section 2, First, and, if not, for the Courts to require compliance with Section 2, First, but without remanding the parties to revisiting any of the procedures of the RLA theretofore

exhausted and to maintain the status quo by injunction until such could be done.

The Court below did not decide whether the District Court correctly determined that both parties had complied with Section 2, First, but, instead, avoided deciding that question by tacking onto the obligation of the parties under Section 2, First, as defined by this Court, the requirement that the parties re-visit each of the steps of the RLA procedures, although this Court did not contemplate nor suggest that such was the obligation of the parties under Section 2, First, of the Act and certainly did not impose any such requirement upon the parties.[1]

B. The Respondent also distorts the extent to which we claim conflict with the decision of other Courts of Appeals. We are told that the decision below is consistent with the decision of the Court of Appeals for the Fourth Circuit in *Piedmont Aviation, Inc.* v. *Airline Pilots Ass'n,* 416 F.2d 633. Neither the opinion cited nor the decision of this Court in 1971 made any suggestion of re-visiting any of the steps in the procedures of the RLA; the fact is that we did not even cite that case in the Petition, since that part of the opinion dealing with Section 2, First, of the RLA in the event the dispute should be found to be a major dispute had been reduced to dictum by a subsequent holding that the case involved a minor dispute, rather than a major dispute (347 F.Supp. 363 (D.C. M.D.

[1] In arguing the case in the District Court in November, 1971, Respondent's counsel admittedly could find no basis in this Court's opinion to support the argument that the District Court should require re-mediation; he admitted that his reliance was upon the dissent. (Tr. November 18-19, 1971, pp. 9-10, 326-329).

N.Car., August 10, 1972)). It is only by taking words and clauses from the decision in the *Piedmont* case out of context and interpolating them that the Respondent would make it appear that the Court of Appeals' opinion in that case carried some suggestion that the revisitation of mediation was required.

Next, the Respondent mis-states our contention as to the conflict between the decision below and the 1967 decision of the Court of Appeals for the D.C. Circuit in *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581 (Br. Opp., p. 9). Our claim of conflict between the decision below and the *Akron and Barberton Belt* case is that there is an inconsistency between the Seventh Circuit's treatment of the 1971 conferences as fulfilling only the initial conference requirements of the Railway Labor Act and the D.C. Circuit's holding in the *Akron and Barberton Belt* case that the carrier had forsaken any right to initial conferences.

5. The Respondent confuses a number of highly important issues, including the necessity for mediation under the RLA and the N-LaG Act, into a dissertation as to whether mediation is "permissive". These issues need to be sorted out and dealt with separately.

A. There is no doubt that, under Section 5, First, of the RLA, if either party invokes mediation or if the Mediation Board proffers it, mediation is mandatory and not permissive. But, no such question is involved in this case.

B. Respondent bases an argument on the refusal of the Petitioner to join with it in invoking mediation just before the final hearing in the District Court in

November, 1971 (Br. Opp., p. 11). From this circumstance the Respondent spells out several completely unfounded conclusions:

(i) The Petitioner is alleged to have failed to exhaust the procedures of the RLA even though there is nothing in that Act requiring either party to invoke mediation; the alleged duty is completely contrary to the specific wording of Section 6, of the RLA, which gives the right of self-help to either party when ten days have elapsed without invocation of mediation or a proffer of mediation; and Respondent brushes aside as dictum the exposition of these provisions of Section 6 in *International Ass'n of Machinists* v. *N.M.B.*, 425 F.2d 527 (D.C. Cir., 1970) (Br. Opp., p. 12, fn. 4).

(ii) Respondent completely ignores its own failure to invoke mediation and appears to suggest that its ability to invoke mediation was somehow dependent upon the Petitioner joining with it in the invocation; no such joinder is required.

(iii) Respondent then seeks to excuse itself from its failure to invoke mediation as a pre-requisite to obtaining an anti-strike injunction, notwithstanding Section 8 of the N-LaG Act and the decision of this Court in *Brotherhood of R.R. Trainmen* v. *Toledo P&W R.R.*, 321 U.S. 50.

C. The Respondent makes it clear, albeit in footnotes, that it is now taking a completely radical and unsupported position with respect to two points concerning the RLA and the N-LaG Act (Br. Opp., pp. 11-12, fn. 3 and 4).

(i) Respondent undertakes to demonstrate that Section 8 of the N-LaG Act is not applicable to injunctions

based on alleged "violations" of the RLA. In doing so, it relies principally on cases cited by this Court in its 1971 decision (Pet. App. F, p. 72a) showing that injunctions are available to enforce the "mandates" of the RLA. Those cases did not involve anti-strike injunctions but Respondent, in arguing its point (Br. Opp., p. 11, fn. 3), treats all the cases as indifferently establishing an excision of Section 8 of the N-LaG Act from any applicability to any alleged violation of the RLA. In so doing, the Respondent completely ignores the careful limitation that this Court placed on its own inferences from these cases with respect to anti-strike injunctions (Pet. App. F, pp. 72a-73a).

(ii) Respondent is now telling us (Br. Opp., p. 12, fn. 4), in spite of the plain language of Section 6 of the RLA and the exposition of that language in *International Ass'n of Machinists* v. *N.M.B.*, 425 F.2d 527, 537 (D.C. Cir., 1970), that a party seeking to exercise self-help under the RLA has an obligation to invoke mediation as a condition precedent thereto. Thus, in footnotes 3 and 4 the Respondent comes full turn: It would eliminate its obligation under Section 8 of the N-LaG Act to have sought mediation and arbitration as a prerequisite to obtaining an anti-strike injunction; instead, it would impose an obligation to invoke mediation on a party seeking self-help. There is no authority whatever for Respondent's positions.

CONCLUSION

The Brief in Opposition when carefully analyzed fails to establish the aura of unimportance of review by this Court but, instead, the questions raised by it emphasize the necessity for this Court to settle the important questions of first impressions which stem from

this Court's decision in this case in 1971. The Writ of Certiorari should be granted.

Respectfully submitted,

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